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In The Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

TERRY CAMPBELL and DIRECTOR, OWCP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Gerard E.W. Voyer
TAYLOR & WALKER, P.C.
1300 First Virginia Tower
555 Main Street
Norfolk, Virginia 23514
(757) 625-7300

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals sanction a departure from the accepted and usual course of judicial proceedings when it found that the Benefits Review Board did not reweigh the evidence in the record and make findings of fact?

2. Did the Fourth Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings by reweighing the evidence in the record and making findings of fact?

3. Did the Fourth Circuit Court of Appeals err by affirming the Benefits Review Board's finding that the administrative law judge acted properly in reviewing the claimant's Section 22 request for modification?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner

The petitioner is Norfolk Shipbuilding and Dry Dock Corporation, whose parent corporation is United States Marine Repair, Inc, and whose grandparent corporation is United Defense Industries, Inc. No publicly held corporation or other publicly held entity owns ten (10) percent or more of the stock of Norfolk Shipbuilding and Dry Dock Corporation.

Respondents

The Respondents are Terry Campbell, an individual; and the District Director, Office of Workers' Compensation Programs, Department of Labor, a government entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' Order denying Petitioner's Petition for Rehearing and Rehearing *en banc* was issued on May 21, 2003, and is reproduced at App. A. The unpublished decision of the Fourth Circuit Court of Appeals affirming the decisions of the Benefits Review Board was issued on March 11, 2003 and is reproduced at App. B. The unpublished decision of the Fourth Circuit Court of Appeals vacating its January 30, 2003, Order is reproduced at App. C. A January 30, 2003, Order by the Fourth Circuit Court of Appeals dismissing Petitioner's appeal is reproduced at App. D. The Benefits Review Board's July 2, 2002, Order affirming the Administrative Law Judge's April 26, 2002, Decision and Order is reproduced at App. E. The Administrative Law Judge's April 26, 2002, Decision and Order is reproduced at App. F. The Benefits Review Board's January 28, 2002, Order is reproduced at App. G. The Administrative Law Judge's December 28, 2000, Decision and Order is reproduced at App. H. The Benefits Review Board's April 7, 2000, Order is reproduced at App. I. The Administrative Law Judge's January 21, 1999, Decision and Order is reproduced at App. J. The Benefits Review Board's June 17, 1998, Order is reproduced at App. K. The Administrative Law Judge's May 22, 1997, Decision and Order is reproduced at App. L. The Administrative Law

Judge's March 5, 1995, Decision and Order is reproduced at App. M.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on March 11, 2003, and denied Petitioner's timely filed Petition for Rehearing and Rehearing *en banc* on May 21, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. 33 U.S.C. § 921(b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

2. 20 C.F.R. § 802.301(a):

> The Benefits Review Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

STATEMENT OF THE CASE

Respondent, Terry Campbell ("Claimant"), suffered bodily injures on May 2, 1987, which he alleged were work-related. Claimant sought medical treatment for his injuries and was given certain work restrictions by his treating physician, Dr. Cary Suter. Petitioner, Norfolk Shipbuilding and Dry Dock Corporation ("Employer") paid Claimant 281 weeks and one day of temporary total disability compensation benefits. Pursuant to these restrictions, the Employer provided Claimant with the light-duty job of performing tests on drop cords and light bulbs. Claimant was terminated by the Employer effective January 13, 1993, for failure to call in on five consecutive days of absence from work, known as the Five Day Rule. The Employer suspended payment compensation benefits due to Claimant's termination for willful misconduct. Claimant subsequently filed a claim for additional benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA").

On September 24, 1994, Administrative Law Judge Malamphy ("ALJ") conducted a hearing in this case. By Decision and Order dated May 5, 1995, he found that (1) there was no Section 49 violation; (2) that Claimant's disability was causally related to his industrial accident; (3) that suitable alternate employment existed; and (4) that Claimant was not entitled to any additional compensation benefits because he was fired from the suitable alternate employment because of willful misconduct.

Claimant timely filed a Motion for Reconsideration on May 19, 1995. The ALJ denied the Motion on June 12, 1995. Claimant did not appeal the May 5, 1995 decision and it became final on July 12, 1995.

On July 21, 1995, Claimant filed a Section 22 Request for Modification, pursuant to 33 U.S.C. § 922, alleging a change in condition and a mistake in fact. He sought an award of permanent total disability benefits. The ALJ conducted a second hearing on December 12, 1996. By Decision and Order dated May 23, 1997, the ALJ found, *inter alia*, that (1) there had been no change in condition and (2) there had been no mistake in fact. The ALJ reaffirmed his May 5, 1995, ruling that the Employer provided Claimant with suitable alternate employment and that Claimant was not entitled to any additional compensation benefits because he was fired from the suitable alternate employment because of willful misconduct

Claimant appealed the ALJ's decision. The Benefits Review Board ("Board"), by decision dated July 17, 1998, affirmed the ALJ's finding that there had been no change in

condition. The Board, however, ruled that the ALJ had made a mistake in fact in its evaluation of the evidence and remanded the case for further consideration of Claimant's ability to perform the light-duty work offered by the Employer.

On January 21, 1999, the ALJ issued his Decision on Remand. He ruled that (1) Claimant was permanently and totally disabled as of January 4, 1993; (2) the light-duty work offered by the Employer was outside Claimant's restrictions and was, therefore, not suitable alternate employment; (3) Claimant reached maximum medical improvement on October 19, 1992; and (4) the Employer was entitled to Section 8(f) relief.

The Employer filed a Petition for Review with the Board on February 4, 1999. On the same day, the Director, Office of Workers' Compensation Programs, United States Department of Labor, filed a Motion for Reconsideration regarding the effective date of Claimant's benefits. On March 9, 1999, the ALJ issued his Decision and Order on the Motion for Reconsideration.

The Employer renewed its Petition for Review on April 8, 1999. The Board issued its Decision and Order on April 7, 2000, in which it vacated the ALJ's Decision and Order on Remand and Decision and Order on Motion for Reconsideration to the extent that it awarded total disability benefits to Claimant while he was working from October 19, 1992 through January 9, 1993 and from September 1993 through December 1993. The Board vacated this portion of the decision because the ALJ had not made a finding that

Claimant was working only through extraordinary effort and in spite of excruciating pain, or for a beneficent employer. The remainder of the ALJ's decision was affirmed.

On remand, the ALJ found that Claimant was entitled to permanent total disability while working for the Employer for the period October 19, 1992, through January 9, 1993, because he had worked through extraordinary effort and in spite of excruciating pain. The ALJ further found that Claimant was entitled to no more than permanent partial disability benefits while working at Savage Builders from September 13, 1993, to December 10, 1993, because there was insufficient evidence in the record to show that Claimant only worked through extraordinary effort and in spite of excruciating pain during that time.

The Employer subsequently appealed the Administrative Law Judge's finding that the Claimant: (1) was entitled to permanent total disability benefits for the period in which he was working for the Employer from October 19, 1992, through January 9, 1993, because he was working through extraordinary effort and in spite of excruciating pain, and (2) Claimant was entitled to permanent partial disability benefits while he worked for Savage Builders from September 13, 1993, to December 10, 1993, despite having been terminated by the Employer for cause.

By Decision and Order dated January 28, 2002, the Board vacated and remanded the ALJ's finding that Claimant worked only through extraordinary effort and in spite of excruciating pain and; therefore, was entitled to permanent total disability benefits for the period in which he was

working for the Employer from October 19, 1992, through January 9, 1993. The Board affirmed the ALJ's award of partial disability benefits from September 13 to December 10, 1993.

By Decision and Order dated April 26, 2002, the ALJ found that Claimant was not entitled to permanent total disability benefits for the time period October 19, 1992, through January 9, 1993 because he did not work through extraordinary effort or in spite of excruciating pain.

On May 29, 2002, the Employer timely filed its Notice of Appeal to the Board seeking review of its June 17, 1998; April 7, 2000; and January 28, 2002, decisions for the purposes of being able to bring the current matter before the Fourth Circuit Court of Appeals.

On June 27, 2002, the Employer served its Petition for Review on all parties seeking review of the aforementioned decisions by the Fourth Circuit.

By Decision and Order dated July 2, 2002, the Board reaffirmed each of its prior rulings.

On appeal to the Fourth Circuit, the Employer made six assignments of error (1) the Board exceeded its scope of review in addressing Claimant's section 22 petition for modification; (2) the Board exceeded its scope of review in vacating the Administrative Law Judge's findings that the Employer offered Claimant suitable alternate employment; (3) the Board erred in finding that the light duty offered by the Employer was not suitable alternate employment; (4) the

Board erred in affirming the Administrative Law Judge's award of benefits to Claimant from September 13 to December 10, 1993; (5) the Board erred in finding that Claimant was entitled to benefits for any period of time following his discharge for cause on January 13, 1993; and (6) the Board erred in accepting Claimant's brief two months late.

By *per curiam* Order dated January 30, 2003, the Fourth Circuit dismissed the Employer's appeal as untimely. The Employer then petitioned for a rehearing and rehearing *en banc*. In a March 11, 2003, Order, the Fourth Circuit granted a panel rehearing, denied the request for a rehearing *en banc*, and vacated its January 30, 2003, Order.

By *per curiam* opinion dated March 11, 2003, the Fourth Circuit, finding no error, affirmed the Board's prior decisions. The Employer timely petitioned for a rehearing and rehearing *en banc* or, alternatively, a panel rehearing on the basis that by affirming the Board's action, the Fourth Circuit allowed the Board to exceed the scope of its review and that the Court, in its initial review of the appeal, misapprehended certain facts and claims. By Order dated May 21, 2003, the Fourth Circuit denied the petition.

REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition because the Fourth Circuit Court of Appeals (1) has sanctioned the Board's departure from the accepted and usual course of the judicial proceedings by allowing the Board to ignore the

statutory standard of review of the ALJ's decisions, (2) has refused to apply the stated standard of review in its own examination of the ALJ's decisions thereby departing from the accepted and usual course of judicial proceedings, and (3) has erred in affirming the Board's ruling that the ALJ was permitted to consider Claimant's request for a Section 22 modification. Such deviant actions can only be corrected through this Court's exercise of its supervisory power.

I. Legal Standard to be Followed by Fourth Circuit Court of Appeals and Board Upon Review of an ALJ's Ruling.

In reviewing the opinions of an administrative law judge, both the Fourth Circuit Court of Appeals and the Board are subject to the same well-settled standard of review:

> We review Board decisions for errors of law and for adherence to the statutory standard governing the ALJ's factual findings. Section 21(b)(3) of the LHWCA directs that "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). To determine whether the Board complied with the standard, the Court of Appeals conducts an independent review of the administrative record. Like the Board, the Court of Appeals will uphold the factual findings of the ALJ so long as they are supported by substantial evidence, and it will not disregard these

> findings merely "on the basis that other inferences might have been more reasonable." Review of factual findings is limited, and "[d]eference must be given the fact-finder's inferences and credibility assessments." Nevertheless, to be sufficient, the evidence must be "more than a scintilla but less than a preponderance," and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The ALJ may not "merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based."
> *Norfolk Shipbuilding and Dry Dock Corp. v. Faulk*, 228 F.3d 378, 380-81 (4th Cir. 2000) (citations ommitted); *see also* 20 C.F.R. § 802.310(a); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 134, 140 (4th Cir.1998); *Burns v. Director, OWCP*, 41 F.3d 1555, 1562 (D.C. App. 1994).

Both the Board and the Fourth Circuit in this case paid lip service to above-cited standard in their respective opinions, but then proceeded to completely disregard that standard in their respective reviews of the ALJ's prior decisions. The instant matter goes far beyond a court's misapplication of a legal standard. Here, both appellate bodies refused to apply the stated legal standard and arbitrarily decided to reevaluate the evidence in the record without giving any deference to the inferences and facts found by the ALJ.

II. Review is Warranted Because the Fourth Circuit Court of Appeals Sanctioned the Board's Disregard of the Stated Legal Standard in its Review of the ALJ's Rulings.

A. The Board Ignored the Statutorily Defined Legal Standard and Reweighed the Medical Evidence.

As noted in the Statement of the Case, *supra*, the ALJ, by Decision and Order dated May 5, 1995, initially ruled that the Employer provided Claimant with light-duty employment within his medical restrictions. The ALJ reaffirmed this finding in his May 22, 1997, Decision and Order, where he denied Claimant's request for a Section 22 modification, finding neither a mistake of fact regarding the extent of his disability nor a change in condition. The Claimant appealed these findings to the Board.

In its June 17, 1998, Order, the Board made no inquiry whatsoever into whether the ALJ's decision was supported by substantial credible evidence and gave no deference to the findings made by the ALJ. The Board did not ask whether the evidence was "more than a scintilla but less than a preponderance," or whether there was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (App. K).

Instead, the Board impermissibly engaged in a *de novo* review of the medical evidence in clear violation of 33 U.S.C. § 921(b)(3) and 20 C.F.R. § 802.301(a). The language used by the Board is revealing about the nature of its review. The Board specifically stated in its Order that the

ALJ "erred in his evaluation of the evidence of record." (App. K at 92a). It then went on to review Dr. Suter's testimony regarding the extent of Claimant's injury and opine that Dr. Suter's testimony was not inconsistent as the ALJ found, but merely reflected the progression of Claimant's condition.[1] (App. K. at 93a-94a).

The Board then vacated the ALJ's finding that the testimony was inconsistent and remanded the case to the ALJ to reconsider his finding that Claimant was capable of performing the light-duty employment provided by the Employer.

Had the Board engaged in the required inquiry upon review, it would have noted that the ALJ gave specific, credible reasons for its finding that Dr. Suter's testimony was inconsistent. The ALJ pointed to the following statements by Dr. Suter: (1) that by letter dated October 19, 1992, Dr. Suter opined that Claimant could perform light duty work for the Employer, although he might miss work on occasion due to headaches; (2) that by letter dated January 5, 1994, Dr. Suter stated that Claimant's condition was the same or worse, but he was still capable of performing light duty work; (3) that by report dated August 5, 1994, Dr. Suter opined that Claimant is completely disabled from regular employment. He also made the same statement in a September 22, 1994,

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[1] It should be noted that the Board, while finding that Dr. Suter's testimony reflected the progression of his diagnosis of Claimant's condition, simultaneously affirmed the ALJ's finding that Claimant's condition had not changed. Both findings were based upon the same medical evidence.

letter to the Disability Determination Board and added that this had been Claimant's condition for the prior six or seven years; (4) that in his December 4, 1996, deposition testimony, Dr. Suter initially testified that Claimant's condition had not changed and that Claimant was completely disabled from work; and (5) that during the same deposition, Dr. Suter stated Claimant's condition had been unchanged and that Claimant's ability to work is the same as it was in 1994 – he could perform light duty work. The only concern raised by Dr. Suter was Claimant's lack of education. (App. L at 102a-106a).

By Decision and Order dated January 21, 1999, the Administrative Law Judge reversed his earlier rulings and found that the Employer failed to offer suitable alternate employment. The ALJ cited no new evidence in support of his finding, but only recited the same reasoning set forth by the Board regarding Claimant's ability to perform the light-duty employment. (App. J at 80a-81a, App. K at 92a). This action by the Board created an additional four years of litigation.

By undertaking its own independent evaluation of the medical evidence, the Board crossed out of its statutory boundaries and took over the fact finding function of the ALJ. Such action is impermissible and departs significantly from the accepted and usual course of judicial proceedings. "Regardless of its perception of the appropriate inferences arising from the evidence, the BRB cannot, as it did in its first review of the ALJ's order, substitute its own fact findings and judgment for that of the ALJ." *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 382 (4th Cir. 1994).

The Board's own description of its actions shows that it was not looking for credible evidence, but was reweighing the evidence in violation of the standard of review. In its April 7, 2000, Order, the Board discussed its June 17, 1998, Order.

> The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits. The Board held that the administrative law judge erred in characterizing the change in Dr. Suter's testimony regarding the extent of claimant's disability from 1994 to 1996 as inconsistent, when in fact it took into consideration the physician's ongoing treatment of claimant and reflected the progression of the diagnosis of claimant's condition subsequent to his work injury.
> (App. I at 63a).

It was not for the Board to re-characterize the medical evidence. As the aforesaid statute, regulation, and case law plainly provides, the Board's sole function on review is to determine whether or not the ALJ's ruling is supported by credible evidence in the record as a whole. While the Employer maintains that there was substantial credible evidence in the record as a whole to support the ALJ's determination, the Board did not even attempt to make that determination. The Board simply chose to make its own

independent evaluation of the record and reweigh the medical evidence. This undertaking effectively renders the ALJ meaningless in the litigation process, unnecessarily caused years of litigation, wasted judicial resources, and created a situation where parties can retry their case on appellate review.

Typically, litigants faced with such an egregious error by the Board turn to the Court of Appeals to remedy the obviously improper action. Nevertheless, as set out *infra*, the Fourth Circuit failed to put the brakes on the runaway activism by the Board. Accordingly, only this Court, through the exercise of its supervisory powers, can instruct the lower courts on the scope of their judicial review power. Although written standards of review have been previously provided, the instant matter demonstrates that the written standards have been reduced to little more than a *pro forma* statement to be made at the beginning of each opinion and then conveniently forgotten when rendering the decision.

B. The Fourth Circuit Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings by Sanctioning the Board's Reweighing of the Medical Evidence.

The Fourth Circuit compounded the Board's divergence from the accepted and usual course of judicial proceedings by sanctioning the Board's seizure of the ALJ's fact finding function. The Fourth Circuit stated in its March 11, 2003, Order that the Board did not reweigh the evidence or substitute its view of the facts, but that the Board just remanded the case to the ALJ to determine if there was a

mistake of fact in his original opinion. (App. B at 6a). This statement grossly misrepresents the record and turns a blind eye to the Board's judicial annexation of the ALJ's fact-finding function.

The explicitly stated reason that the Board chose to vacate and remand the case is because it believed that the ALJ "erred in his evaluation of the evidence of record when discussing that a mistake of fact occurred." (App. K at 92a). In particular, the Board asserted that the ALJ did not properly interpret the medical evidence. It was this reweighing of the facts that prompted the Board to remand the case. Upon remand, the ALJ was required to revisit his prior interpretation of Dr. Suter's opinion testimony in light of the facts as "found" by the Board on review. The Fourth Circuit's perfunctory statement that the Board did not reweigh the evidence demonstrates that the Fourth Circuit has abandoned its responsibility to ensure that the Board acts within the scope of its power.

C. The Fourth Circuit Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings by Sanctioning the Board's Reweighing of Evidence Regarding Suitable Alternate Employment.

The Board not only ignored the stated standard of review when it re-evaluated the testimony of Dr. Suter, it also ignored the statutory standard of review by conducting its own *de novo* review of the record regarding the issue of whether the Employer provided Claimant with suitable alternate employment. In doing so, the Board contradicted

the ALJ's finding that the Employer provided Claimant with suitable alternate employment.

The Board's June 17, 1998, Decision plainly makes factual findings regarding Claimant's ability to perform his light duty work. The Board expressly stated "We agree with claimant, however, that the administrative law judge erred in his evaluation of the evidence of record when discussing claimant's assertion that a mistake in fact had occurred." (App. K at 92a). The Board then went on to immediately explain what evidence it believed the ALJ should have relied on in finding that Claimant was unable to perform the Employer's light duty employment. (App. K at 92a).

On appeal the Fourth Circuit sanctioned the Board's action by pretending that it did not happen. The Fourth Circuit stated in its March 11, 2003, Order that:

> However, a review of the BRB's decision shows that Norshipco is incorrect. **The BRB reviewed the ALJ's initial 1994 decision--** outlining Campbell's restrictions and the requirements of his post-injury job. However, the BRB made no findings of error in this regard, **nor was this order before the BRB for review**. Instead, the BRB, as discussed above, found that the ALJ had not considered the full range of medical evidence in the record on Campbell's motion for modification, and thus, the **BRB remanded for a determination of whether, considering all the medical evidence, Campbell could**

> **perform the light-duty position offered by Norshipco.** Since the BRB made no factual or legal findings regarding the suitability of the alternate employment, it did not exceed its authority in reviewing the ALJ's determination. (App. B at 7a). (emphasis added).

The Fourth Circuit's error regarding the Board's action is evident from the language that it has used in its opinion. First, the Fourth Circuit's opinion asserts that the Board reviewed the ALJ's initial 1994 Decision,[2] which, among other things, concluded that the Employer offered Claimant suitable alternate employment, that is, light duty employment within Claimant's restrictions. The Fourth Circuit then went on to state contradictorily that the initial Decision and Order was not before the Board for review. Certainly if the issue of suitable alternate employment had not been before the Board for review, the Board would have had no authority for remanding the case to the ALJ to "consider the totality of the evidence of record regarding the issue of claimant's ability to perform light-duty work."

Therefore, if the Fourth Circuit believed that the ALJ's initial finding that the Employer provided claimant with suitable alternate employment was not before the Board, then the Fourth Circuit was required to find that the Board erred in remanding the case to the ALJ to consider the evidence regarding Claimant's ability to perform the light duty

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[2] The ALJ's first Decision and Order was dated May 5, 1995, not 1994.

employment. If, on the other hand, the issue of light duty employment was before the Board, then the Fourth Circuit erred in declining to review the Employer's assignment of error.

There can be no doubt that the ALJ understood that the Board had found that the Employer had not provided suitable alternate employment. In the Discussion section of its December 28, 2000, Decision and Order, the ALJ wrote – "The Board has held that during late 1992, the Claimant's job was not suitable alternate employment." (App. H at 57a-58a). Additionally, on remand, the ALJ reversed his earlier opinion regarding suitable alternate employment. (App. J).

The Board disregarded the applicable standard of review in evaluating the ALJ's decision regarding suitable alternate employment. The Board made no attempt to determine whether the ALJ's findings were supported by credible evidence. As the Board stated, it simply disagreed with the manner in which the ALJ weighed the evidence. The Board set out in its opinion the evidence that it would have given greater weight to and then ordered the ALJ to reconsider and revise its opinion.

As the Court of Appeals for the District of Columbia noted: "We have often held that within this framework, it is the duty of the ALJ, not the BRB, to weigh the evidence and draw reasonable inferences therefrom. The BRB has no authority to second-guess the findings of the ALJ if those findings are supported by substantial evidence. *See Burns* at 1562. By failing to require that the Board undertake the required inquiry, the Fourth Circuit has placed the stamp of approval upon the Board's impermissible conduct.

The Board's rejection of the substantial evidence standard under has been previously noted by the Fifth Circuit Court of Appeals. In *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991), the Fifth Circuit was presented with essentially the same situation as raised in the current matter. In that case, the administrative law judge was presented with the issue of whether the claimant was capable of performing the light-duty employment offered by the employer. The administrative law judge was presented with medical evidence that could support a finding for either party. The administrative law judge in *Mijangos* happened to find in favor of the claimant. The Board reversed the decision and remanded the case to the administrative law judge, finding that the administrative law judge did not give sufficient weight to the expert medical testimony.

The Fifth Circuit stated that the Board had exceeded its statutorily defined powers of review by impermissibly reweighing the evidence and making its own credibility determinations. So long as the administrative law judge's credibility determinations and findings are both rational and supported by substantial evidence, they must be affirmed.

III. Review is Warranted Because the Fourth Circuit Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings by Undertaking to Reweigh the Evidence in the Record.

In addition to failing to ensure that the Board does not ignore its statutorily imposed standard of review, the Fourth Circuit rejected the legal prohibition against it

reweighing the evidence in the record. As set forth *supra*, the Fourth Circuit is not permitted to disregard the ALJ's findings merely because it believes other inferences may have been more reasonable. The Fourth Circuit was obligated to defer to the ALJ's inferences from the evidence. Despite this clear directive, the Fourth Circuit reweighed the medical evidence and drew its own inferences. The Fourth Circuit, after engaging in its own fact-finding, stated that Dr. Suter's opinions were consistent. The Fourth Circuit, however, disagreed with the Board interpretation of Dr. Suter's testimony as showing a progression of Claimant's condition. Rather, the Fourth Circuit wrote:

> While Dr. Suter originally determined that Campbell was able to work in a part time, light duty position, Campbell reported that the necessity of pain mediation and its effects made regular work more difficult than Dr. Suter thought. Thus, Dr. Suter came to the conclusion that, although Campbell could conceivably work on certain days, his condition and medication rendered regular employment untenable. Thus, Dr. Suter's opinion was not inconsistent – Campbell's condition had not changed, rather Dr. Suter revised his opinion based on Campbell's unsatisfactory attempts to continue to work. (App. B at 6a).

While this may be how the Fourth Circuit would have chosen to weigh the evidence had it been in the ALJ's seat, it is not the function of the Court of Appeals draw inferences

from the evidence in the record. This endeavor by the Fourth Circuit is patently outside the scope of its powers and is clear departure from the accepted and usual course of judicial proceedings. Again, only this Court is in a position to remind the Fourth Circuit of its judicial responsibilities and the limit of its power.

IV. Review is Warranted Because the Fourth Circuit Court of Appeals Sanctioned the Board's Impermissible Review of Claimant's Request for Section 22 Modification.

A compensation award should only be revisited if it would serve the ends of justice and after the court balances the need to render justice against the need for finality in decision making. *See O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 25, 92 S. Ct. 405 (1971); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25 (1st Cir. 1982); *see also Moon Engineering Co. v. Baum*, 139 F.3d 891 (4th Cir. 1998). Further, an allegation of a mistake of fact may not be used as a back door route to retry a case. *See McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. App. 1976).

Although a Section 22 modification is a permissible remedy for reviewing and correcting factual mistakes, it cannot be used to correct legal errors. *See Moore v. Virginia Int'l Terminals*, 35 BRBS 28 (2001); *Ring v. I.T.O. Corp. of Virginia*, 31 BRBS 212 (1998). The Board has previously recognized that whether the Employer has met its burden of showing suitable alternate employment is a purely legal issue that can only be reversed through the appellate process and may not be challenged through Section 22 modification. *See*

Smith v. American Univ., 14 BRBS 875, 879 (1982). The Board recognized that Claimant was alleging a mistake of fact regarding the ALJ's finding that he was capable of performing suitable alternate employment. Thus, the Fourth Circuit should have found that the ALJ and the Board lacked jurisdiction to revisit the Administrative Law Judge's earlier ruling. Had Claimant wanted to challenge the ALJ's finding that the Employer had provided suitable alternate employment, Claimant should have filed a timely appeal with the Board rather than using a Section 22 modification as a back door to an appeal. Claimant, however, failed to file a timely appeal.[3]

CONCLUSION

It is clear that both the Fourth Circuit Court of Appeals and the Benefits Review Board have departed from the accepted and usual course of judicial proceedings by ignoring the well-settled standard of review of an administrative law judge's decision. In this case, neither Court undertook an analysis of whether the Administrative Law Judge's inferences from the evidence and findings of fact were supported by substantial credible evidence in the record as a whole. Instead, each Court engaged in a *de novo* review of the evidence and made their own findings of fact. The

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[3] The ALJ issued his Order denying reconsideration on June 12, 1995. From that time, Claimant had thirty (30) days to appeal the ruling. *See* 20 C.F.R. § 702.350. Claimant failed to file any appeal. On July 21, 1995, Claimant filed his request for a modification.

Employer respectfully requests that this Court find that the Benefits Review Board and the Fourth Circuit Court of Appeals exceeded the scope of their powers of review and reinstate that Administrative Law Judge's May 22, 1997, Decision and Order. Accordingly, the Employer requests that its petition for writ of certiorari be granted.

Respectfully submitted,

/s/ Gerard E.W. Voyer
Gerard E.W. Voyer
Taylor & Walker, P.C.
1300 First Virginia Tower
555 Main Street
Norfolk, Virginia 23514
(757) 625-7300

No. _____

In The Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

TERRY CAMPBELL and DIRECTOR, OWCP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

Gerard E.W. Voyer
TAYLOR & WALKER, P.C.
1300 First Virginia Tower
555 Main Street
Norfolk, Virginia 23514
(757) 625-7300

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX A

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, Petitioner, v. TERRY CAMPBELL; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.

No. 02-1701
94-822

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Filed: May 21, 2003

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner

APPENDIX B

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, Petitioner, v. TERRY CAMPBELL; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.

No. 02-1701

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided: March 11, 2003

Before WILLIAMS, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion:

PER CURIAM:

Norfolk Shipbuilding and Drydock Corporation ("Norshipco") petitioned for review of various orders of the Department of Labor's Benefits Review Board ("BRB"). This court dismissed the appeal as interlocutory, pursuant to *Elliot Coal Mining Co. v. Director, OWCP, 956 F.2d 448 (3d Cir. 1992)*. Norshipco now petitions for panel rehearing or rehearing *en banc*, arguing that its timely filed docketing statement and formal brief should be considered the functional equivalents of a petition for review. We grant the petition for panel rehearing

and, upon a review of the merits, affirm the award of benefits to Terry Campbell, finding no error in the BRB's reasoning. n1

> n1 Because we grant panel rehearing, we deny the petition for rehearing *en banc* as moot.

After Campbell injured his head, neck, and back while working for Norshipco in 1987, he continued to work, receiving differing amounts of disability compensation from May 1987 to January 1993. Norshipco terminated his employment in 1993 for excessive absenteeism. Campbell then filed a claim for temporary total disability under the *Longshore and Harbor Workers' Compensation Act* ("LHWCA").

After a hearing in 1994, the Administrative Law Judge ("ALJ") found that (1) Campbell was not fired in retaliation for filing a disability claim, (2) suitable alternate employment existed despite Campbell's limitations, and (3) Campbell was fired from the suitable alternate employment for willful misconduct. In 1995, Campbell filed a request for modification alleging a change in condition and a mistake in fact regarding his ability to perform the alternate employment offered by Norshipco. He sought an award of permanent total disability benefits.

After a second hearing in 1996, the ALJ denied Campbell's motion, finding that there had been no change in condition and no mistake in fact. Campbell appealed, and on June 17, 1998, the BRB affirmed the ALJ's determination that there had been no change in condition. However, the Board remanded for further consideration of Campbell's ability to perform the light-duty work offered by Norshipco.

In 1999, the ALJ ruled that the light-duty work offered by Norshipco was outside Campbell's restrictions and was, therefore, not suitable alternate employment. Thus, the ALJ awarded permanent partial disability benefits. Following this order came several years of further litigation, including two appeals to the BRB on which Norshipco was successful. The ALJ entered his final order, awarding limited benefits to Campbell on April 26, 2002. Norshipco then filed a notice of appeal to the BRB, seeking a final order so that it could file a petition for review with this court of the BRB's June 17, 1998 decision. The BRB affirmed the ALJ's April 26, 2002 order and affirmed its prior orders in a final decision filed July 2, 2002. Norshipco timely filed for review in this court. n2

> n2 We construe Norshipco's docketing statement and brief, filed within sixty days after the BRB's final decision, as a timely petition for review. *Cf. Hartsell v. Duplex Products, Inc., 123 F.3d 766, 771 (4th Cir. 1997).*

Norshipco first argues that the ALJ erred in considering Campbell's modification motion, since it was based on a legal, rather than a factual, contention. Norshipco further contends that the BRB erred in reviewing the ALJ's decision on the merits rather than merely determining that the ALJ had exceeded its jurisdiction in reconsidering a legal issue.

Section 22 of the LHWCA provides that a compensation decision may be modified, within certain time constraints, based on a change of condition or a mistake of fact. *33 U.S.C. § 922 (2000).* This modification procedure is extraordinarily broad, especially insofar as it permits the correction of

mistaken factual findings. *Betty B Coal Co. v. Director, OWCP, 194 F.3d 491, 497 (4th Cir. 1999).* Any mistake of fact may be corrected whenever justice requires, whether based on wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *Id.*
Campbell moved for modification based on an allegedly mistaken finding as to the extent of his disability. His claim was based on medical reports which were already in the record, as well as medical reports created after the ALJ's initial decision. This claim of mistake is clearly of a factual nature--there was disagreement as to the interpretation of the medical evidence. Thus, it was properly raised and reviewed on appeal in a *Section 22* proceeding.

Norshipco next contends that the BRB's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings. *See Director, OWCP v. Quarto Mining Co., 901 F.2d 532, 536 (6th Cir. 1990)* (noting that BRB reviews ALJ's decision to determine whether it is supported by substantial evidence and consistent with applicable law). In denying modification, the ALJ determined that Dr. Suter, Campbell's treating physician, gave inconsistent testimony. According to the ALJ, on the one hand, Dr. Suter suggested at times that Campbell was capable of working light duty, part time work and, at other times, Dr. Suter concluded that Campbell was totally disabled. In addition, Dr. Suter stated that Campbell's condition had not changed since Dr. Suter began treating him. Based on these findings, the ALJ concluded that Campbell was only partially disabled and that he was capable of performing the light duty, parttime work offered by Norshipco.

On appeal, the BRB held that the ALJ erred in finding that Dr. Suter's opinion was inconsistent. Instead, the BRB found that Dr. Suter's changing opinions reflected the progression of Campbell's condition. n3 The BRB also found that the ALJ failed to consider Dr. Dvorak's opinion, which was supportive of Dr. Suter's conclusions regarding the extent of Campbell's disability.

> n3 While Dr. Suter originally determined that Campbell was able to work in a part time, light duty position, Campbell reported that the necessity of pain medication and its effects made regular work more difficult than Dr. Suter thought. Thus, Dr. Suter came to the conclusion that, although Campbell could conceivably work on certain days, his condition and medication rendered regular employment untenable. Thus, Dr. Suter's opinion was not inconsistent--Campbell's condition had not changed, rather Dr. Suter revised his opinion based on Campbell's unsatisfactory attempts to continue to work.

We hold that the BRB properly vacated the ALJ's decision because the ALJ failed to consider all the evidence of record and because the ALJ's determination that Dr. Suter's opinion was contradictory was not supported by substantial evidence. Contrary to Norshipco's assertions, the BRB did not reweigh the evidence or substitute its view of the facts for the view of the ALJ. Instead, the BRB remanded to the ALJ for him, after consideration of the totality of the evidence, to ultimately determine whether there was a mistake in fact in his

original opinion. The only thing required by the BRB was that the ALJ consider all the evidence, including Dr. Suter's 1996 deposition testimony (rather than simply dismissing it as inconsistent) and the opinion of Dr. Dvorak. As such, the BRB properly reviewed the ALJ's decision.

Norshipco next contends that the BRB improperly made findings regarding the availability of suitable alternate employment in its 1998 review of the ALJ's denial of *Section 22* modification. However, a review of the BRB's decision shows that Norshipco is incorrect. The BRB reviewed the ALJ's initial 1994 decision--outlining Campbell's restrictions and the requirements of his post-injury job. However, the BRB made no findings of error in this regard, nor was this order before the BRB for review. Instead, the BRB, as discussed above, found that the ALJ had not considered the full range of medical evidence in the record on Campbell's motion for modification, and thus, the BRB remanded for a determination of whether, considering all the medical evidence, Campbell could perform the light-duty position offered by Norshipco. Since the BRB made no factual or legal findings regarding the suitability of the alternate employment, it did not exceed its authority in reviewing the ALJ's determination.

Finally, Norshipco contends that Campbell's brief on his appeal to the BRB from the denial of his motion for modification was untimely filed and should have been disregarded. However, Campbell filed a motion to enlarge time, which was granted. Such [HN2] an extension of time is within the BRB's discretion. *20 C.F.R. § 802.217(a) (2000).* Norshipco offers no reason to believe that the BRB abused its discretion.

Based on the foregoing, we affirm the award of benefits to Campbell. We dispense with oral argument, because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, Petitioner, v. TERRY CAMPBELL; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.

No. 02-1701

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided: March 11, 2003

Panel rehearing granted and rehearing en banc denied by opinion filed 3/11/03; opinion filed 1/30/03 is vacated.

APPENDIX D

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, Petitioner, v. TERRY CAMPBELL; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.

No. 02-1701

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided: January 30, 2003

Before WILLIAMS, MOTZ, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

PER CURIAM:

Norfolk Shipbuilding and Drydock Corporation ("Norshipco") petitions for review of various orders of the Department of Labor's Benefits Review Board ("BRB"). Because we find that we lack jurisdiction to review the orders appealed from, we dismiss the petition.

Terry Campbell filed a claim for temporary total disability under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). After a hearing in 1994, the Administrative Law Judge ("ALJ") denied the claim. In 1995, Campbell filed a request for modification alleging a change in condition and a mistake in fact regarding his ability to perform the alternate

employment offered by Norshipco.

After a second hearing in 1996, the ALJ denied Campbell's motion, finding that there had been no change in condition and no mistake in fact. Campbell appealed, and on June 17, 1998, the BRB affirmed the ALJ's determination that there had been no change in condition. However, the Board remanded for further consideration of Campbell's ability to perform the light-duty work offered by Norshipco.

In 1999, the ALJ ruled that the light-duty work offered by Norshipco was outside Campbell's restrictions and was, therefore, not suitable alternate employment. Thus, the ALJ awarded permanent partial disability benefits. Following this order came several years of further litigation, including two successful appeals to the BRB by Norshipco. The ALJ entered his final order, awarding limited benefits to Campbell on April 26, 2002. On May 29, Norshipco filed a notice of appeal to the BRB, seeking a final order so that it could file a petition for review with this court of the BRB's June 17, 1998 decision. Without waiting for a final order, Norshipco filed a petition for review in this court on June 27, 2002. The BRB affirmed the ALJ's April 26, 2002 order and affirmed its prior orders in a final decision filed July 2, 2002.

Norshipco's petition for review predated the BRB's final order. While Norshipco's petition was timely filed as to the ALJ's April 26, 2002 order, [HN1] administrative decisions under the LHWCA are only reviewable by this court if they constitute a "final order of the Board [BRB]." *33 U.S.C. § 921*(c) (2000). Thus, we have no jurisdiction to review the administrative law judge's order. *See Elliot Coal Mining Co.*

v. Director, Office of Workers' Compensation Programs, 956 F.2d 448, 449-50 (3d Cir. 1992). Since there has been no petition filed regarding the BRB's final order, the petition is dismissed. We dispense with oral argument, because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX E

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, D.C. 20013-7601

BRB No. 02-0611

TERRY W. CAMPBELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION	)	Date Issued: July 2, 2002
	)	
and	)	
	)	
RICHARD FLAGSHIP SERVICES INCORPORATED	)	Not-Published
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	ORDER

Employer has filed a timely appeal of the administrative law judge's Decision and Order on Remand filed April 30, 2002. 33 U.S.C. §921(a), (b); 20 C.F.R. §§802.205, 802.207. This appeal is assigned BRB No. 02-0611. All correspondence relating to this appeal must bear this number.

Employer also has filed a motion for expedited review. Employer requests that the Board issue a final decision in the captioned case so that it may pursue an appeal of the Board's three previous decisions in this case. *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998), BRB No. 99-0704 (April 7, 2000), BRB No. 01-0426 (Jan. 28, 2002). Claimant has not responded to this motion.

Claimant, a rigger, injured his head, neck, and back at work on May 2, 1987. Employer voluntarily paid claimant various periods of total and partial disability benefits between May 1987 and January 7, 1993. Claimant returned to light duty work for employer in October 1992 but was fired from this job on January 9, 1993, for violating a company rule. Claimant worked for Savage Builders from September 13 to December 10, 1993. In his initial Decision and Order, the administrative law judge denied claimant's claim for total disability benefits commencing January 9, 1993. Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking total disability benefits commencing August 5, 1994. The administrative law judge denied benefits, and claimant appealed.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998), the Board affirmed the administrative law judge's finding that there had been no change in claimant's condition since the initial decision. The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits.

On remand, the administrative law judge awarded claimant total disability benefits commencing January 4, 1993, following claimant's discharge, finding that employer did not establish suitable alternate employment as claimant's light duty job in employer's facility was not within claimant's restrictions and too physically demanding. Upon the motion for reconsideration of the Director, Office of Workers' Compensation Programs, the administrative law judge awarded claimant total disability benefits as of October 19, 1992, the date he found claimant reached maximum medical improvement.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 99-0704 (April 7, 2000), the Board affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment through claimant's post-injury light duty job at its facility. Consequently, the Board affirmed the administrative law judge's award of total disability benefits for the periods when claimant was not working. The Board, however, vacated the administrative law judge's award of total disability benefits for the period claimant was actually working. The Board

remanded the case to the administrative law judge to determine whether claimant was entitled to total disability benefits for the period when he was working part-time in the light duty job for employer from October 19, 1992, to January 9, 1993, and for Savage Builders from September 13 to December 10, 1993.

On remand, the administrative law judge found that claimant worked through extraordinary effort and in spite of excruciating pain from October 19, 1992, to January 9, 1993, and consequently awarded claimant total disability benefits for this period. The administrative law judge awarded claimant only partial disability benefits for the period from September 13 to December 10, 1993.

Employer appealed the administrative law judge's award of total and partial disability benefits.[1] The Board vacated the award of total disability benefits while claimant worked for employer, and remanded the case for the administrative law judge to discuss claimant's testimony and to provide a rationale for crediting or not crediting it. The

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[1]Employer also raised contentions concerning the Board's first two decisions in this case in order to preserve these issues for appeal. The Board did not address employer's arguments that: (1) the Board exceeded its scope of review with regard to the administrative law judge's 1995 and 1997 decisions; (2) the Board erred in affirming the administrative law judge's granting of claimant's petition for modification in BRB No. 97-1371; and (3) the Board erred in affirming the administrative law judge's finding that the light duty job at employer's facility was not suitable in BRB No. 99-0704, as the Board's prior rulings constituted the law of the case.

administrative law judge also was to determine the sufficiency of Dr. Suter's reports for purposes of establishing that claimant worked only through extraordinary effort and in spite of excruciating pain. *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 01-0426 (Jan. 28, 2002). The Board affirmed the award of partial disability benefits from September 13 to December 10, 1993.

On remand, the administrative law judge denied claimant benefits for the period from October 19, 1992 to January 9, 1993, finding that claimant did not work only through extraordinary effort and in spite of excruciating pain. On appeal, employer does not challenge this finding, but seeks the entry of a final order so that it may appeal the Board's prior decisions. *See* 33 U.S.C. §921(c).

Employer's motion for expedited review is granted. Employer has raised no issues with regard to the administrative law judge's decision on remand, and the Board's prior decisions constitute the law of the case. *See, e.g., Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). Employer has not offered a basis for departure from this rule. Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

/s/_____
ROY P. SMITH
Administrative Appeals Judge

/s/_____

REGINA C. McGRANERY
Administrative Appeals Judge

/s/_____
BETTY JEAN HALL
Administrative Appeals Judge

APPENDIX F

United States Department of Labor
Office of Administrative Law Judges
603 Pilot House Drive – Suite 300
Newport News, VA 23606-1904

Issue date: 26Apr2002

Case No.: 1994-LHC-0822
OWCP No.: 5-61489
BRB No.: 01-0426

In the Matter of:

TERRY W. CAMPBELL,

Claimant,

v.

NORFOLK SHIPBUILDING AND
DRYDOCK CORPORATION,

Employer,

and

RICHARD FLAGSHIP SERVICES
INCORPORATED,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest.

DECISION AND ORDER ON REMAND DENYING COMPENSATION FOR THE PERIOD FROM OCTOBER 19, 1992 TO JANUARY 9, 1993

In an order of remand issued on January 28, 2002, the Benefits Review Board once again directed the undersigned to consider whether or not

> based on the aggregation of factors, that claimant worked only through extraordinary effort and in spite of excruciating pain during the period from October 19, 1992 to January 9, 1993.

On March 1, 2000, the undersigned issued an order directing the parties to submit briefs on this issue. The parties have complied with this directive.

In January 2002, the Board stated that

> On remand, the administrative law judge must discuss and weigh claimants relevant testimony and explain his reasons for crediting or discrediting this testimony. The administrative law judge also must determine

the sufficiency of Dr. Suters reports from October 1992 to January 1993, which state that claimant experiences "some" pain while working and that claimant has to take pain medications while working. See Ezell v. Direct Labor, Inc., 33 BRBS 19; Burch v. Superior Oil Co., 15 BRBS at 425; Williams v. General Dynamics Corp., 10 BRBS 915, 919 (1979); Decision and Order on Remand at 5-8; Cl. Exs. 1 at 8, 10, 9 at 34, 36-37; Emp. Ex. 4 at Exhibit 15; Emp. Ex. E.

The administrative law judge may find, based on the aggregation of factors, that claimant worked only through extraordinary effort and in spite of excruciating pain.[1] See Shoemaker v. Schiavone & Sons, Inc., 11 BRBS 33,37 (1979); Steele v. Associated Banning Co., 7 BRBS 501, 509 (1978). The administrative law judge, however, must evaluate all relevant evidence to determine whether this standard is met. If the administrative law judge does not find that claimant was working through extraordinary effort and in spite of excruciating pain, he should consider claimants entitlement to partial disability benefits for this period. In awarding partial disability benefits, the administrative law judge must determine claimants post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. 908(h), taking into account claimants pain and

that his light duty job at employers facility was outside of his work restrictions. See Ramirez v. Sea-Land Services, Inc., 33 BRBS 41, 45 n. 5; Ezell, 33 BRBS at 27.

Contentions

Claimant submits this brief in support of a finding of work through excruciating pain and extraordinary efforts as the evidence establishes that claimant credibly testified regarding his pain and this is supported by the deposition and hearing testimony of Dr. Suter and Dr. Gieb. Additionally, there is a sufficient aggravation of factors including the actual pain suffered by claimant, the side effects of medication including difficulty in transportation and attendance, the employers unwillingness to respect claimants work restrictions, and the employers unwillingness to accommodate claimants work schedule to address the transportation and attendance issues. Rather, claimant, only through extraordinary efforts and excruciating pain endured this aggregation of negative factors and worked from October 19, 1992 through January 9, 1993.

Therefore, claimant asserts that through the aggregation of these factors and pursuant to Newport News Shipbuilding & Dry Dock Co. v. Wiggins, No. 00-2532, 2001 WL 1598094 (4th Cir. Dec. 14, 2001) (unpublished), claimant has established that he worked during this period only through excruciating pain and through extraordinary pain entitling him to temporary total disability benefits for

this period.

Claimant's Counsel states that Campbell suffered excruciating pain while he worked. He performed jobs beyond his restrictions. The use of pain medication made it difficult for him to obtain transportation to work and to arrive on time.

The Employer stated that the

> Claimant has not offered any facts or assertions on which to conclude that he worked through extraordinary effort and in spite of excruciating pain. Claimant points to his doing work that this Court has previously deemed to be outside his restrictions as evidence that he worked through extraordinary effort and in spite of excruciating pain. See ALJ Decision and Order (Dec. 28, 2000) at 3. Significantly, Claimant has not shown or explained how working outside his restrictions constituted an extraordinary effort and caused excruciating pain. Claimants unfounded leap in logic is consistent with the complete lack of evidence for concluding that Claimant worked under such conditions or that he was totally disabled.

The Employer reports that the

> Claimant never complained about being

worked outside his restrictions to his supervisor, treating physician, or the shipyard medical doctor. See ALJ Order and Decision (May 5, 1995) at 18. Claimant failed to pursue his allegations to union representatives that the shipyard was causing him to work outside his restrictions -- allegations he made only after he was terminated. (TR1 72-73). Further, the statement of Dr. Suter that Claimant reported "some pain" does not establish any unusual or heightened effort by Claimant.

Dr. Suters records simply do not support Claimants suggestions of "extraordinary effort" or "excruciating pain." During the time period currently at issue, Dr. Suter only saw Claimant once - on or about December 3, 1992. Dr. Suter had not seen Claimant since June 1992. (EX-6 at 16). The notable absence of any visits or complaints to his treating physician belies Claimant assertion of "extraordinary pain" or with "extraordinary effort."

Dr. Suters note of December 3, 1992, only indicates that Claimant had a subjective complaint on that day of "some pain in his neck and arms." In particular, he had "some pain into his right arm at times when he is working in a reaching or stretching position." (CX9-36.). Claimants subjective complaints did not alter Dr. Suters opinion that Claimant

could continue with light duty. He made no change in Claimants restrictions. Dr. Suter went on to indicate that Claimant informed him that the slight increase in pain that he felt under these certain limited circumstances really was not a significant increase.

Claimant asserted that his medications caused him to oversleep. Further, Claimant stated it was the Employers fault he was late because the Employer scheduled him to work the morning shift, 7:00 a.m. to 11:00 am. Dr. Suter noted that Claimant should take his medication only after work, in this case, about 11:00 a.m. Consequently, Claimant could have taken his medication at any time during the day, but instead decided to take it at a time that he knew could cause him to oversleep.

Evaluation of the Evidence

At the hearing in 1994, Campbell testified that he lived forty miles form work and had an accident in 1992 while he was on the prescribed medications. He worked from seven to eleven in the morning and had difficulty working due to the prescriptions. He did not have a telephone at home.

Campbell was asked

Q What sort of pain or discomfort would you have which caused you to take medication at work?

A The motions of, you know, of using the hand--held equipment, stooping and bending if I had to, and just mainly just trying to sit on them hard chairs. Or, you know, if I didnt sit on there, I had to stand on just pure concrete.

Q Where would you feel pain or discomfort, what part of your body?

A I would feel it through my neck, across my shoulders, underneath the shoulder blades and in my hip area because after I sat so long I had to, you know, try to adjust myself, which would I do that, it would inflame my headaches.

Q What type of medication were you taking in 1992 while at work to help you with this pain?

A I was taking Fiorinal, Dolobids, Cafergot, Percodans, Valiums, a blood pressure (pill) (TR1, p30).

Dr. Geib, a shipyard physician, testified that he talked to Dr. Suter in late 1992 and discussed Campbell. Dr. Geib stated that

It was discussed whether he could drive with his medication, and Dr. Suter allowed that if he took his medication after work and not too

late at night, that there would be no problem driving. (TR1, p106).

In early November 1992, Dr. Geib refilled the prescriptions after Campbell stated that his medicines had been stolen. (TR1, p 133).

Duane White testified that he was the supervisor of the light duty shop in 1992 and 1993. White discussed the work involving repair of extension cords and lamp guards. On one occasion, the Claimant complained of medication affecting his driving but he never complained of being asked to work beyond his restrictions. If Campbell complained of dizziness, White would tell him to take a break. This occurred about once a week.

Campbell testified at a hearing in 1996. (TR2).

Dr. Suter, a neurologist, treated the Claimant on several occasions in 1992. In October, the physician stated that

> I have not seen Mr. Campbell since June 1 of this year. Nevertheless, it was my opinion then that he was able to do light work and that he could do this half time. If he does half a day at a time, five days a week, I would think that would be reasonable. If, on the other hand, he wanted to consider trying two full days of light work and a half day, that might be reasonable. In any case, when I saw him in June, it was my thought that he could indeed

do 20 hours of work a week as long as it was light work.

As far as driving is concerned, I would think he could drive an hour at a time though obviously this adds some stress and strain to the situation.

In the past, Mr. Campbell claimed that the shipyard would not offer him the light work, and if the shipyard does indeed offer to have him do light work 20 hours a week, I think it might be best for him to do that.

Following a visit in December, Dr. Suter stated that

The main problem has to do with the extra medicines he takes when he has extra pain and extra headache. These are to some degree sedative and they would conceivably interfere with him driving. He says that on one occasion driving back and forth he has hit the guard rail when he dozed off.

I think we will have to say that his regular medicine which consists of Robaxisal tablets, twice a day, and Atenolol 50 mgs each morning probably is a safe medicine as far as driving is concerned. However, if he takes his prn medicine which is Fiorinal tablets, Valium, and Percodan, or some combination of these, then I do not believe it would be safe

for him to drive. Unfortunately, I think he does need these prn medicines from time to time.

Ideally he should take them only after work and not in the morning before work or at work.

It would certainly seem reasonable that an attempt should be made to work out some rehabilitation of this patient so he can go to some other type work or have some other type arrangement that does not require driving for long distances to get to work. I do not know the solution to this problem. However, I do not think it is safe for him to drive when he is taking certain combinations of medicine for his post-traumatic headache and his cervical spine pain. I have discussed this matter with the patient and told him what I think about it.

On January 5, 1993, Dr. Suter reported

Mr. Campbell is under my care for post-trauma cervical spondylosis and post-trauma vascular headache. The medications being prescribed to him for these conditions may at times cause Mr. Campbell to over sleep. (CX 1).

By court order dated November 23, 1992, Campbell's driver's license was restricted for

> one year due to a conviction for driving while intoxicated. The blank marked alcohol was checked and the blank for drugs was ignored. (CX 3).

Records from Dr. Suter are contained in CX9.

When deposed in December 1994, Dr. Suter testified that he first examined Campbell in 1998. The physician saw the Claimant in 1988. The physician saw the Claimant in June and in December of 1992. When asked about Campbell relating that he had dozed off while driving to work, Dr. Suter stated

> When he had his bad headaches, if he took his headache medicine which when he took the whole batch included Fiorinal Valium and Percodan, I didnt think it was probably safe for him to drive.
>
> I thought as long as he was just on his baits (ph.) medicine for his muscle, baxisole (ph.) and tennilovel (ph.) for his headache, that was his regular medicine, but when he took batches of medicine for the severe headaches, I didnt think he could drive. (CX 6, p17).

Q (In 1992) They made a job for him within the restrictions that you specified. Is that your understanding?

> A Yes. I understand that they put him back to half time light work.

Q Okay. And in your opinion, at that time, he was capable of doing that work. Is that right?

A Yes.

Q And I think you wrote a report saying well, if you have a problem driving, take these medications and you specified them which shouldnt cause a problem with driving?

A Not take the others until night.

Q And in your opinion, if he did that, he ought to be able to get to work and get back?

A That was my hope. (CX 6, p 52).

Employer's counsel mentioned that the blood alcohol level was .33 at the time of the arrest in late 1992. Dr. Suter was asked

Q Does the medication that you gave him have increased his blood alcohol level?

A Not that much. (CX 6, p 55).

Dr. Suter stated that if Campbell had lived closer to work and did not have difficulty in reaching the job

A It was my opinion he could work half time and I think he may well have missed days

from headaches, but he could work.

Q And he could have done the job as you understood it?

A Yes. (CX 6, p 57).

Dr. Neal, a neurosurgeon, examined Campbell in September 1994, and the physician was deposed in January 1995. (EX 7, EX G).

Dr. Suter was deposed in December 1996. (CX 1A).

Discussion

In the brief, the Employer has mentioned the "Burch" and "Adam" cases. However, no citations were provided.

White testified that he would let the Claimant rest when he complained of being groggy, about once a week. There were no complaints to the supervisor about being worked beyond the assigned restrictions.

Campbell saw Dr. Suter in December 1992. The physician mentioned the affects of the medications and stated that Campbell should take the stronger medications after he returned home from work. The physician issued an advisory note in January 1993.

Both parties have referred to Wiggins, a recent unpublished opinion of the Fourth Circuit. That Court does not favor use of language from such cases.

The undersigned has considered Wiggins as well as Argonaut Insurance Co. v. Patterson, 21 BRBS 51 (CRT) (11th Cir 1988), Haughton Elevator Company v. Lewis, 7 BRBS 838 (4th Cir 1978), and Van Dyke v. NNS&DD Co., 8 BRBS 388 (1978), as well as other mentioned cases.

The record indicates that Campbell saw Dr. Suter and the shipyard clinic infrequently during the period in question. Moreover, he made few complaints to his supervisor and needed "rest" about once a week. As previously stated, the undersigned did not find that there was much credibility in Campbell's testimony at the hearings. The undersigned does not find that the Claimant worked only through extraordinary effort and in spite of excruciating pain.

In this case after a review of Ramirez v. Sea-Land Service, Inc., 33 BRBS 41(1999), and Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999), I find that payment under Section 8(h) of the At was appropriate from October 19, 1992 to January 9, 1993.

Order

The Claimant is not entitled to compensation for the period from October 19, 1992 to January 9, 1993.

/s/ _____
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

The following abbreviations will be used as citations to the record:

TR1 - Transcript of the Hearing in 1994;
TR2 - Transcript of the Hearing in 1996;
CX - Claimants Exhibits; and
EX - Employers Exhibits.

APPENDIX G

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, D.C. 20013-7601

BRB No. 01-0426

TERRY W. CAMPBELL Claimant-Respondent v.	)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION and	)	DATE ISSUED: 01/28/2002
RICHARD FLAGSHIP SERVICES INCORPORATED Employer/Carrier-Petitioners	)	Not-Published
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	

DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer, Donna White Kearney, and Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-LHC-822) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. Claimant, a rigger, injured his head, neck, and back at work on May 2, 1987. Employer voluntarily paid claimant various

periods of total and partial disability benefits between May 1987 and January 7, 1993. Claimant returned to light duty work for employer in October 1992 but was fired from this job on January 9, 1993, for violating the five day call-in rule. Claimant worked for Savage Builders from September 13 to December 10, 1993. In his initial Decision and Order, the administrative law judge denied claimant's claim for total disability benefits commencing January 9, 1993. Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §§922, seeking total disability benefits commencing August 5, 1994. The administrative law judge denied benefits, and claimant appealed.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998)(unpublished), the Board affirmed the administrative law judge's finding that there had been no change in claimant's condition since the initial decision. The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits.

On remand, the administrative law judge awarded claimant total disability benefits commencing January 4, 1993, following claimant's discharge, finding that employer did not establish suitable alternate employment as claimant's light duty job in employer's facility was outside of claimant's restrictions and too physically demanding. Upon the motion for reconsideration of the Director, Office of Workers' Compensation Programs, the administrative law judge

awarded claimant total disability benefits as of October 19, 1992, the date he found claimant reached maximum medical improvement.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 99-0704 (April 8, 2000)(unpublished), the Board affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment through claimant's post-injury light duty job at its facility. Consequently, the Board affirmed the administrative law judge's award of total disability benefits for the periods when claimant was not working. The Board, however, vacated the administrative law judge's award of total disability benefits for the period claimant was actually working, as an award of total disability benefits while working is to be the exception and not the rule. The Board remanded the case to the administrative law judge to determine whether claimant was entitled to total disability benefits for the period when he was working part-time in the light duty job for employer from October 19, 1992, to January 9, 1993, and for Savage Builders from September 13 to December 10, 1993. Such a determination would require the administrative law judge to find that claimant worked through extraordinary effort and in spite of excruciating pain, or for a beneficent employer, for these two periods.

On remand, the administrative law judge found that claimant worked through extraordinary effort and in spite of excruciating pain from October 19, 1992, to January 9, 1993, and consequently awarded claimant total disability benefits for this period. The administrative law judge found that claimant did not work through extraordinary effort and in

spite of excruciating pain from September 13 to December 10, 1993, and thus awarded only partial disability benefits for this period. The administrative law judge further found that neither employer nor Savage Builders was a beneficent employer.

On appeal, employer challenges the administrative law judge's award of total and partial disability benefits for these two periods. Employer also raises contentions concerning the Board's first two decisions in this case in order to preserve these issues for appeal.[1] Claimant filed a response brief to which employer replied.

Employer initially argues that the administrative law judge erred in awarding claimant total disability benefits from October 19, 1992, to January 9, 1993, because the fact that claimant sought and was prescribed medication while he was working is insufficient to establish that he worked through extraordinary effort and in spite of excruciating pain. Claimant may be found to be totally disabled while he is working in post-injury employment if he works through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence,[2] *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT)(1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT)(11th Cir. 1988); *Lewis v. Haughton Elevator Co.*, 5 BRBS 62 (1976), *aff'd*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), though such an award is to be the exception, rather than the rule. *See, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In the instant case, the administrative law judge

noted that the Board had affirmed the finding that claimant's post-injury job with employer was not suitable, and he then summarily concluded that claimant worked through extraordinary effort and in spite of excruciating pain because Dr. Suter prescribed numerous medications for claimant's pain in late 1992 and because claimant sought additional medical help from the shipyard's clinic where other pain medications were prescribed.[3] The administrative law judge also stated, however, that claimant's credibility was "quite questionable."[4]

We cannot affirm the administrative law judge's award of total disability benefits for the period in question. The administrative law judge's apparent reliance only on the fact that claimant took several pain medications while working is not sufficient, standing alone, to support the award of total disability benefits. *See Burch v. Superior Oil Co.*, 15 BRBS 423, 425 (1983). Moreover, the administrative law judge found claimant's testimony "quite questionable" but did not explain which testimony he found questionable, nor did he explain whether he credited or discredited claimant's testimony regarding his difficulties in performing his job in finding that claimant worked through extraordinary effort and in spite of excruciating pain. Thus, we must remand this case for reconsideration. On remand, the administrative law judge must discuss and weigh claimant's relevant testimony and explain his reasons for crediting or discrediting this testimony. The administrative law judge also must determine the sufficiency of Dr. Suter's reports from October 1992 to January 1993, which state that claimant experiences "some" pain while working and that claimant has to take pain medications while working. *See*

Ezell, 33 BRBS 19; *Burch*, 15 BRBS at 425; *Williams v. General Dynamics Corp.*, 10 BRBS 915, 919 (1979); Decision and Order on Remand at 5-8; Cl. Exs. 1 at 8, 10, 9 at 34, 36-37; Emp. Ex. 4 at Exhibit 15; Emp. Ex. E.

The administrative law judge may find, based on the aggregation of factors, that claimant worked only through extraordinary effort and in spite of excruciating pain.[5] *See Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33, 37 (1979); *Steele v. Associated Banning Co.*, 7 BRBS 501, 509 (1978). The administrative law judge, however, must evaluate all relevant evidence to determine whether this standard is met. If the administrative law judge does not find that claimant was working through extraordinary effort and in spite of excruciating pain, he should consider claimant's entitlement to partial disability benefits for this period. In awarding partial disability benefits, the administrative law judge must determine claimant's post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §§908(h), taking into account claimant's pain and that his light duty job at employer's facility was outside of his work restrictions. *See Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n. 5; *Ezell*, 33 BRBS at 27.

Employer next contends that the administrative law judge erred in awarding partial disability benefits from September 13 to December 10, 1993, because claimant's discharge in January 1993 from his post-injury light duty job at employer's facility for a non-work-related reason negated any requirement that it establish the availability of suitable alternate employment after that date. A claimant is entitled to disability benefits where he is discharged from a post-

injury job at employer's facility which was not suitable for him given his restrictions, and thereafter sustains a loss of wage-earning capacity on the open market. *See generally Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT)(4th Cir. 2001); *Norfolk Shipbuilding & Dry Dock Corp. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999); *compare Brooks v. Newport New Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT)(4th Cir. 1993)(claimant is not entitled to total disability benefits when he is discharged from a *suitable* job at employer's facility due to a violation of a company rule). As the light duty job at employer's facility was outside claimant's restrictions, employer's premise is not consistent with law, and it is rejected.

In the instant case, the administrative law judge awarded partial disability benefits from September 13 to December 10, 1993, on the basis that claimant sustained a loss of wage-earning capacity in his employment with Savage Builders. Employer does not contest this finding. Thus, as claimant sustained a loss in wage-earning capacity following his discharge from the unsuitable job at employer's facility, we affirm the administrative law judge's award of partial disability benefits from September 13 to December 10, 1993.[6] *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated with respect to his award of total disability benefits for the period of October 19, 1992, to January 9, 1993, and the case is remanded to the

administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

/s/_____
ROY P. SMITH
Administrative Appeals Judge

/s/_____
REGINA C. McGRANERY
Administrative Appeals Judge

/s/_____
BETTY JEAN HALL
Administrative Appeals Judge

Footnotes.

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1) We decline to address employer's arguments that the Board exceeded its scope of review with regard to the administrative law judge's 1995 and 1997 decisions, and erred in affirming the administrative law judge's granting of claimant's petition for modification in BRB No. 97-1371, and the administrative law judge's finding that the light duty job at employer's facility was not suitable in BRB No. 99-0704,

as the Board's prior rulings constitute the law of the case. *See, e.g., Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

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2) The administrative law judge's conclusion that neither employer was a beneficent employer is affirmed as unchallenged on appeal. Decision and Order on Remand at 8.

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3) From October 19, 1992, to January 9, 1993, claimant was prescribed robaxisal, atenolol, cafergot, and fiorinal for his headaches, valium to relieve muscle tension at night, and percodan for pain relief by Dr.
Suter, his treating physician. Cl. Exs. 1, 9. Prescription refills were provided for these medications, in addition to tenormin, by Dr. Geib, the shipyard clinic's doctor. Emp. Ex. E.

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4) Claimant testified that he was having problems performing his part-time light duty work with employer, testing drop cords and light bulbs, because he was taking a lot of medications due to the job's requirements of using hand-held equipment, which was outside of his work restrictions, and of bending and carrying. 1994 Tr. at 28-29. In response to what kind of pain caused him to take medication at work, claimant stated, "The motions of, you know, of using the hand-held equipment, stooping and bending if I had to, and just mainly just trying to sit on them hard chairs. Or, you know, if I didn't sit on there, I had to stand on just pure concrete." 1994 Tr. at 30. Claimant took fiorinal, dolobid, cafergot, percodan, and valium prescribed by Dr. Suter and refilled by Dr. Geib to relieve pain in his neck, shoulders, and hip. *Id.* The pain medications would

make him drowsy and he would sleep on the job. 1994 Tr. at 31. He testified he could not work on days where he had such severe headaches or such lower back pain that he could not move because he was on so much medication. *Id.* Claimant's counsel relied on this testimony to support his argument that claimant worked through extraordinary effort and in spite of excruciating pain. *See* Decision and Order on Remand at 3. The administrative law judge noted claimant's testimony in his decision. Decision and Order on Remand at 7.

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5) The Fourth Circuit, in an unpublished decision, recently affirmed an award of total disability benefits to a claimant who was working post-injury through extraordinary effort and perseverance and in spite of considerable pain and discomfort based on her testimony which was corroborated by the opinions of Dr. Stiles, her treating physician, and Mr. DeMark, a rehabilitation counselor. *See Newport News Shipbuilding & Dry Dock Co. v. Wiggins*, No. 00-2532, 2001 WL 1598094 (4th Cir. Dec. 14, 2001)(unpublished). In that case, claimant testified that she worked in pain and was forced to stop working to rest at times because of pain and swelling in her knee, and pain in her hands. Dr. Stiles stated that claimant's work caused "a lot" of pain and prescribed a knee brace and medications for the pain. Additionally, Mr. DeMark stated that claimant's work as a part-time newspaper carrier required "extra effort" on her part and was outside of her medical restrictions. He stated she worked because she needed the money as her compensation had been terminated. Although Rule 36(c) of the rules of the Fourth Circuit, 4th Cir. R. 36(c), disfavors the citation of unpublished cases, we

believe our discussion of *Wiggins* is consistent with the Rule because *Wiggins* may be instructive to the administrative law judge in determining claimant's entitlement to total disability benefits. There is no other Fourth Circuit precedent discussing application of factors relevant to "extraordinary effort" and "excruciating pain" determinations. The court's decision in *Haughton Elevator Co. v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), merely affirmed a total disability award to a working claimant, as supported by substantial evidence.

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6) The administrative law judge's conclusion that claimant did not perform his post-injury job with Savage Builders through extraordinary effort and in spite of excruciating pain and his determination of the amount of partial disability benefits awarded based on claimant's post-injury earnings with Savage Builders are affirmed as unchallenged on appeal. Decision and Order on Remand at 8-9.

APPENDIX H

United States Department of Labor
Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904

Date: December 28, 2000

Case No.: 1994-LHC-0822

OWCP No.: 5-61489

BRB No.: 01-0426

In the Matter of:

TERRY W. CAMPBELL,
Claimant,

v.

NORFOLK SHIPBUILDING AND
DRYDOCK CORPORATION,
Employer,

and

RICHARD FLAGSHIP SERVICES
INCORPORATED,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER ON REMAND GRANTING PERMANENT TOTAL DISABILITY FROM OCTOBER 19, 1992 TO JANUARY 9, 1993 AND GRANTING PERMANENT PARTIAL DISABILITY FROM SEPTEMBER 13, 1993 TO DECEMBER 10, 1993

In a decision and order issued on April 7, 2000, the Benefits Review Board stated that the Employer.

> did not establish suitable alternate employment by virtue of the light duty job at its facility. Inasmuch as the job was not suitable for claimant, he is not precluded from obtaining total disability benefits despite his discharge from the job for excessive absenteeism. Thus, the Board affirmed the award of total disability benefits for the periods when claimant was not working.

The Board noted that Campbell apparently worked from October 19, 1992 to January 9, 1993 and from September 1993 through December 1993.

The Board remanded the

> case for further consideration of the extent of claimant's disability for the periods of time he was working part-time in the light duty job for employer from October 19, 1992, through January 9, 1993, and for a different employer from September through December 1993. If the administrative law judge does not find that claimant was working under the above circumstances, he should consider claimant's entitlement to partial disability benefits for these periods. In awarding partial disability benefits, the administrative law judge must determine claimant's loss in wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), taking into account that claimant's light duty job at employer's facility was too physically demanding for him and outside his work restrictions, as we have affirmed these findings, and that claimant may have worked in pain at Savage Builders. *See Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5; *Ezell*, 33 BRBS at 26-27.

Claimant's counsel argues that

> In this case, the claimant clearly only was able to work due to extraordinary efforts. Even just getting to work required an incredible effort. The claimant's doctor informed the Shipyard that claimant was prescribed medication for his pain that would cause him to oversleep. (Tr.- 1, Pg. 28, 30). Yet the

Shipyard continued to schedule him for early morning shifts of seven a.m. to eleven a.m. (Tr.-1, Pg. 26, 27). The claimant lived forty miles each way from work and was prescribed significant pain medication which impeded his ability to drive. Claimant exhausted all efforts to find other modes of transportation to and from work.

Once at work, the claimant was required to work outside of his work restrictions and stated that he had difficulty performing these tasks. He specifically was prescribed no work with handheld tools and no bending and stooping. (Tr.-1, 25). The claimant was expected to perform tasks that his treating physician had prohibited, yet through extraordinary efforts, he did perform these tasks albeit with excruciating pain. (Tr.-1, Pg. 28, 29, 30). This is illustrated by the fact that he had to "eat a whole bunch of pills during the daytime when I was working just to keep the pain down until I could get out of there." (Tr.-1, Pg. 43). Clearly, claimant was only able to comply with the Shipyard's demand of employment by extraordinary efforts and withstanding excruciating pain.

The Claimant reports that at Savage Builders he had to sit extensively. He had to sweep and dump cans which violated the restrictions against lifting and the use of hand tools.

The Employer reports that the Claimant

has not offered any facts or assertions on which to conclude that he worked through extraordinary effort or in spite of excruciating pain. Despite Claimant's statements that the light-duty work that he was performing would cause pain through his neck, across his shoulders, and underneath his shoulder blades, and that this pain caused headaches, he has not asserted that the pain became excruciating or that it rose to a level that required an extraordinary effort to work. (TR1 29-30.)[1]

The Employer stated that the Claimant is not

entitled to total disability benefits on the basis that he worked for a beneficent employer or in sheltered employment. Claimant has never made such allegations and the record does not support such a finding. Instead, the record shows that the work done by Claimant was regular and necessary. The evidence also definitively establishes that the Employer accommodated Claimant's work restrictions by allowing him to rest as needed and by

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[1] The following abbreviations will be used: "TR1" for the transcript of the September 20, 1994 hearing; "TR2" for the transcript of the December 12, 1996 hearing; "CX" for Claimant's Exhibits; and "EX" for Employer's Exhibits.

providing support for selected tasks.

> With respect to Claimant's work at Savage Builders, Claimant presented no evidence that shows that he worked only through extraordinary effort or in excruciating pain. Claimant testified that he supervised the loading of trucks at Savage Builders, but left there because work was slack and he did not feel that he could handle it. (TR1 37-38.) There is no contemporaneous medical evidence to support Claimant's assertion that he was unable to do the work.

Evaluation of the Evidence

EX A indicates that Campbell was paid temporary total disability between October 2, 1992 and December 13, 1992 for ten and 3/7 weeks for a total amount of $2512.04. He was paid temporary total disability from December 14 to December 30, 1992 in the amount of $1029.88. Between December 31, 1992 and January 3, 1993 he was paid 4/7 of a week of temporary partial disability in the amount of $74.51.

EX A reflects the average weekly wage as $636.11 with a compensation rate of $424.01 per week.

In EX B, answers to interrogatories, the Claimant stated that he was

> employed by Savage Builders from approximately September 13, 1993 to

approximately December 10, 1993 and earned a total of $1,156.00. In dividing this amount by 13 weeks, the claimant reportedly earned an average of $88.00 per week. An IRS form 1099 confirms those earnings for 1993.

On June 1, 1992, Gary G. Suter, M.D., a neurologist reported

DIAGNOSIS: Chronic cervical sprain

TREATMENT: Restricted to light, limited duty three to four-hour day, three days a week. No hand-held equipment or operating vehicles or driving when taking medication.

WORK STATUS: 7/12/90 - Same

RETURN APPOINTMENT: December 3, 1992

In October 1992, Dr. Suter informed the Claimant's counsel of that date that

I have not seen Mr. Campbell since June 1 of this year. Nevertheless, it was my opinion then that he was able to do light work and that he could do this half time. If he does half a day at a time, five days a week, I would think that would be reasonable. If, on the other hand, he wanted to consider trying two full days of light work and a half day, that might be reasonable. In any case, when I aw him in June, it was my thought that he could indeed do 20 hours of work a week as

long as it was light work.

As far as driving is concerned, I would think he could drive an hour at a time though obviously this adds some stress and strain to the situation.

In the past, Mr. Campbell claimed that the shipyard would not offer him the light work, and if the shipyard does indeed offer to have him do light duty work 20 hours a week, I think it might be best for him to do that.

In early December 1992, Dr. Suter stated that

> Mr. Campbell is seen for a follow-up visit. He still has some pain in his neck and arms. He still has spasms in his trapezius muscles and in his paraspinal muscles. He complains of some pain into the right arm at times when he is working in a reaching or stretching situation.
>
> It has been my opinion that he can do light work four hours a "week," and apparently he has been doing this. He says he has some increase in neck and arm pain as a result, bu not tremendous change.
>
> The main problem has to do with the extra medicines he takes when he has extra pain and extra headache. These are to some degree sedative and they would conceivably interfere with him driving. He says that on one

occasion driving back and forth he has hit the guard rail when he dozed off.

I think we will have to say that his regular medicine which consists of Robaxisal tablets, two twice a day, and Atenolol 50 mgs each morning probably is a safe medicine as far as driving is concerned. However, if he takes his prn medicine which is Fiorinal tables, Valium, and Percodan, or some combination of these, then I do not believe it would be safe for him to drive. Unfortunately, I think he does need these prn medicines from time to time.

Ideally he should take them only after work and not in the morning before work or at work.

It would certainly seem reasonable that an attempt should be made to work out some rehabilitation of this patient so he can go to some other type work or have some other type arrangement that does not require driving for long distances to get to work. I do not know the solution to this problem. However, I do not think it is safe for him to drive when he is taking certain combination of medicine for his post-traumatic headache and his cervical spine pain. I have discussed this matter with the patient and told him what I think about it.

On January 5, 1993, Dr. Suter repoted that

> Mr. Campbell is under my care-for post-trauma cervical spondylosis and post-trauma vascular headache. The medications being prescribed to him for these conditions may at times cause Mr. Campbell over sleep.

Mr. Campbell was seen in the shipyard clinic on several occasions in 1992. On October first the Claimant reported that the neck was better, and he was cleared for working four hours a day and for driving a car. On October 21, he complained of muscle cramps and medication was prescribed. In mid-November refills were provided for cafergot, fiorinal, percoda, and valium.

On December 4, 1992, Campbell was referred to Dr. Suter because of neck complaints. Campbell made similar complaints on December 14 and 30, 1992. Medication refills were provided on the later date. [EX E]. EX F consists of shipyard writeups for tardiness and absence between late October 1992 and early January 1993. On several occasions, Campbell gave the effects of medication as an excuse.

Dr. Suter examined Campbell in June 1993 and prescribed medications at that time and again in October 1993.

Campbell was seen on December 6, 1993 and Dr. Suter stated that with the use of medications that Claimant could perform light work for four hours a day. It was reported that Campbell had not been able to afford medication since early that year. In August 1994, Dr. Suter stated that Campbell was totally disabled due to headaches.

Dr. Suter was deposed in December 1994 and in December 1996. In 1994, Dr. Suter testified that Campbell could drive when taking some of the medications. However, other medications were to be taken in the evening to avoid an impact on his driving.

At the hearing in 1994, Campbell testified that his job in late 1992 was to test drop cords and to remove broken light bulbs from sockets. He used hand held equipment and had to stoop and bend. Campbell took numerous medications and had been known to fall asleep on the job.

Campbell stated that at Savage Builders

> I was working under my doctor's restrictions. I was working four hours a day with no lifting or nothing like that. I've got a lot of past experience in the construction field, and all I would do is just supervise the loading of trucks, you know, just sit there and just look in the trucks and make sue whatever job they was going on they had the right equipment. And then I would push a broom or empty a trash can.

He left Savage as "I just couldn't handle it. And the work got slack . . . it was getting wintertime." [TR1, pp. 37-38].

Discussion

The Board has held that during late 1992, the

Claimant's job was not suitable alternate employment. However, in order for total disability benefits to be paid while Campbell was working there must be a finding that he worked only through extraordinary effort and in spite of excruciating pain, or worked for a "beneficent" employer.

The Employer has clearly spelled out that the job was necessary to the operation fo the shipyard and that other have continued to perform such work. While the shipyard made some accommodations during this period, it is apparent that the shipyard was not a beneficent employer.

Campbell's credibility is quite questionable in this case. However, Dr. Suter prescribed numerous medications in late 1992. In addition, Campbell made numerous trips to the clinic and requested additional medications during this time. I find that Campbell worked only through extraordinary effort and in spite of excruciating pain on the days that he worked from October 19, 1992 through January 9, 1993.

Therefore, Campbell is entitled to permanent total disability during this period.

Campbell has indicated that he had similar problems during his work for Savage Builders from September 13, 1993 to December 10, 1993. The file does not contain records from Savage that indicated that Campbell had problems while working there.

Campbell did not see a physician during this time period and later informed Dr.Suter that he did not have any

medications during late 1993.

While Campbell may have worked for minium wage at Savage there is no evidence that this firm was a beneficent employer. Likewise, there is no indication that Campbell performed only through extraordinary effort. Therefore, he is entitled to no more than permanent partial disability while he worked for Savage.

Order

1. The Employer shall pay the Claimant permanent total disability from October 19, 1992 to January 9, 1993.

2. The Employer shall pay the Claimant permanent partial disability from September 13, 1993 to December 10, 1993 at a rate which will reflect his earning at Savage Builders.

3. Payments for other periods of time remain in effect.

4. The Employer shall not be liable for penalties until ten days after notice form the District Director as to the amount to be paid.

5. The Employer shall receive a credit for all compensation that it has already paid for those periods.

6. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to

be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

7. All computations are subject to verification by the District Director.

8. Claimant's attorney within 20 days of the receipt of this order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

/s/ _____
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

APPENDIX I

U.S. Department of Labor
Benefits Review Board
BRB No. 99-0704

TERRY W. CAMPBELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION	)	DATE ISSUED: April 7, 2000
	)	
and	)	
	)	
RICHARD FLAGSHIP SERVICES INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

DECISION and ORDER

Appeal of the Decision and Order on Remand and Decision and Order on Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and Decision and Order on Motion for Reconsideration (94-LHC-822) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is on appeal to the Board for the second time. Claimant, a rigger, injured his head, neck, and back at work on May 2, 1987. Employer voluntarily paid claimant temporary total and temporary partial disability benefits for

various periods between May 1987 and January 7, 1993. Claimant returned to light duty work for employer in October 1992 but was fired from this job on January 9, 1993, for violating the five day call-in rule. Claimant worked for a different employer from September 1993 through December 1993. In his initial Decision and Order, the administrative law judge denied claimant's claim for temporary total disability benefits commencing January 9, 1993. Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking permanent total disability benefits commencing August 5, 1994. The administrative law judge denied benefits, and claimant appealed.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998)(unpublished), the Board affirmed the administrative law judge's finding that there had been no change in claimant's condition since the initial decision. The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits. The Board held that the administrative law judge erred in characterizing the change in Dr. Suter's testimony regarding the extent of claimant's disability from 1994 to 1996 as inconsistent, when in fact it took into consideration the physician's ongoing treatment of claimant and reflected the progression of the diagnosis of claimant's condition subsequent to his work injury. The Board also remanded the case for the administrative law judge to discuss and weigh Dr. Dvorak's May 6, 1994, opinion which had not been considered in the administrative

law judge's decision on modification.

On remand, the administrative law judge awarded claimant permanent total disability benefits commencing January 4, 1993, following claimant's discharge, finding that employer did not establish suitable alternate employment as claimant's light duty job in employer's facility was outside of claimant's restrictions and too physically demanding. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Upon the motion for reconsideration of the Director, Office of Workers' Compensation Programs, the administrative law judge awarded claimant permanent total disability benefits as of October 19, 1992, the date he found claimant reached maximum medical improvement.

On appeal, employer challenges the administrative law judge's award of benefits, contending that the administrative law judge erred in awarding total disability benefits as of October 19, 1992, as claimant's light duty job in employer's facility constituted suitable alternate employment, and since claimant did not request compensation on modification until August 5, 1994. Employer also raises contentions concerning the Board's first decision in this case in order to preserve these issues for appeal.[1] Claimant did not file a response brief.

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[1]Contrary to employer's argument, the Board acted within its discretion in denying its motion to dismiss claimant's appeal, and in addressing claimant's appeal of the administrative law judge's Decision and Order Denying Section 22 Modification in BRB No. 97-1371 even though

Employer initially argues that the administrative law judge erred in finding that claimant's light duty job in employer's facility was not suitable, as employer asserts it was within Dr. Suter's restrictions. Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). One way that employer can meet this burden is by providing claimant with a suitable light duty job within its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). A job which is outside of claimant's restrictions or is too physically demanding for claimant is not suitable alternate employment. *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). Claimant may be found to be totally disabled while he is working in post-injury employment if he works through extraordinary effort and in spite of excruciating pain, or is provided a position only through an employer's beneficence, *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Lewis v. Haughton Elevator Co.*, 5 BRBS 62 (1976), *aff'd*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), though such an award is to be the exception, rather than the rule. *See, e.g., Ezell v. Direct Labor, Inc.*, 33

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claimant's counsel did not timely file his Petition for Review and brief, as the Board has the discretion to extend the time for filing a Petition for Review and brief. *See* 20 C.F.R. §802.211(d).

BRBS 19 (1999). These standards for establishing entitlement to disability compensation are equally as applicable in modification proceedings as they are in initial adjudications. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997). Contrary to employer's contentions, the issue of whether a light duty job constitutes suitable alternate employment is question of fact, subject to Section 22 modification,[2] *see generally Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993); *Finch v. Newport New Shipbuilding & Dry Dock Co.*, 21 BRBS 196 (1989), and the doctrine of *res judicata* does not preclude the re-litigation of claimant's entitlement to total disability compensation, as Section 22 displaces traditional concepts of finality in decision making by allowing the fact-finder to "correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see also Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459 (1968); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

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[2]Employer's reliance on the holding in *Smith v. The American University*, 14 BRBS 875 (1982)(that the issue of suitable alternate employment is a question of law and thus not a proper basis for a motion for modification), is misplaced as in that case partial disability, instead of total disability, was erroneously awarded despite the fact that employer admitted no evidence of suitable alternate employment once claimant established his *prima facie* case of total disability. *Smith*, 14 BRBS at 878-879.

In the instant case, the administrative law judge found that the job at employer's facility was not suitable for claimant, as it was too physically demanding and was outside of his medical restrictions.[3] Decision and Order on Remand at 4-6. The administrative law judge acted within his discretion in crediting claimant's testimony that the light duty job in employer's facility caused him pain through the neck, across the shoulders, and in his hip area, and inflamed his headaches. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); 1994 Tr. at 25, 28-30 (Emp. Ex. 1 at 25, 28-30); Cl. Exs. 1 at 9, 9 at 26, 27, 35. By 1992, Dr. Suter stated claimant could perform light duty work three to four hours per day, three days a week. Cl. Exs. 1 at 9, 9 at 26, 27, 35; Emp. Ex. 2 at 35. He also stated claimant could not use hand-held equipment, or drive or operate vehicles while taking pain medication. *Id.* After that time, Dr. Suter stated that although claimant's condition did not deteriorate, claimant was too sedated to work if he took sufficient medication to control his work-related headaches and cervical spine pain. Cl. Exs. 1, 1A at 14, 2A, 9; Emp. Ex. 6 at 22-24. In view of claimant's need for pain medication, the

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[3]Claimant's light duty job involved testing lights using hand-held equipment which hung from heavy 50 foot electrical cords. 1994 Tr. at 161-164 (Emp. Ex. 1 at 161-164). Although another worker would place the electrical cords on a counter for claimant, claimant still would have to bend down to tape the cords and carry them to the appropriate stack. 1994 Tr. at 29 (Emp. Ex. 1 at 29). Claimant testified that he felt pain while using hand-held equipment, stooping and bending, and sitting on hard chairs. 1994 Tr. at 30 (Emp. Ex. 1 at 30).

administrative law judge reasonably interpreted Dr. Suter's restriction from working with hand-held equipment while taking medication as precluding claimant from performing the job provided by employer.[4] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Campbell*, slip op. at 4; Decision and Order on Remand at 6. Moreover, the administrative law judge acted within his discretion in relying upon Dr. Dvorak's May 6, 1994, opinion that claimant is completely disabled from working as a laborer as it is supportive of Dr. Suter's opinion regarding the extent of claimant's disability. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.3d 403 (2d Cir. 1961); Decision and Order on Remand at 3-4. The evidence credited by the administrative law judge thus leads to the conclusion that a mistake of fact occurred in the determination that employer established the availability of suitable alternate employment. As the administrative law judge's findings are rational and supported by substantial evidence, we affirm his determination that employer did not establish suitable alternate employment by virtue of the light

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[4]Dr. Neal's opinion that claimant should have been able to return to his usual work without restrictions on August 2, 1987, was not credited by the administrative law judge since that physician's opinion was premised on his conclusion that the headaches which disable claimant are not work-related. The administrative law judge previously found that the headaches are in fact work-related, crediting the opinion of Dr. Suter in this regard. *See* 1995 Decision and Order at 16; Emp. Exs. G, 7 at 14, 18, 22. Thus, Dr. Neal's opinion is insufficient to establish that claimant is not now totally disabled.

duty job at its facility. Inasmuch as the job was not suitable for claimant, he is not precluded from obtaining total disability benefits despite his discharge from the job for excessive absenteeism. *Cf. Brooks v. Newport New Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993) (claimant is not entitled to total disability benefits when he is discharged from a *suitable* job at employer's facility which he was successfully performing due to a violation of a company rule). Thus, we affirm the award of total disability benefits for the periods when claimant was not working.

However, despite our affirmance of the administrative law judge's finding that claimant's job at employer's facility was not suitable alternate employment, we cannot affirm the administrative law judge's award of total disability benefits during the period that claimant was actually working. The administrative law judge did not find that claimant was working only through extraordinary effort and in spite of excruciating pain, or for a beneficent employer,[5] and such findings are necessary in order for total

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[5]The administrative law judge stated correctly in his initial Decision and Order that total disability concurrent with continued employment will usually be granted only in circumstances where post-injury employment is due solely to the beneficence of the employer or where claimant's continued employment is due to extraordinary effort and in spite of claimant's excruciating pain and diminished strength, and he found that claimant was not working through extraordinary effort. 1995 Decision and Order at 18-19.

disability to exist concurrently with claimant's working. *See Ezell*, 33 BRBS at 26-27. Thus, we remand this case for further consideration of the extent of claimant's disability for the periods of time he was working part-time in the light duty job for employer from October 19, 1992, through January 9, 1993, and for a different employer from September through December 1993.[6] If the administrative law judge does not find that claimant was working under the above circumstances, he should consider claimant's entitlement to partial disability benefits for these periods. In awarding partial disability benefits, the administrative law judge must determine claimant's loss in wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), taking into account that claimant's light duty job at employer's facility was too physically demanding for him and outside his work restrictions, as we have affirmed these findings, and that claimant may have worked in pain at Savage Builders.[7] *See*

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[6]Claimant worked part-time for a different employer, Savage Builders, for three months earning minimum wage and a total of $1,156. Emp. Ex. C-15. Claimant testified that he quit his job supervising the loading of trucks at Savage Builders because he could not handle it and because work got slack due to the wintertime. 1996 Tr. at 25; 1994 Tr. at 36-38, 74 (Emp. Ex. 1 at 36-38, 74). This short-term job therefore is also insufficient to establish ongoing suitable alternate employment.

[7]The parties initially stipulated that if claimant was able to perform 20 hours of light work per week, then claimant would have a loss of $423.11 in weekly income, yielding a temporary partial compensation rate of $282.07. 1995 Decision and Order at 2 n. 7. This stipulation was not made

Ramirez v. Sea-Land Services, Inc., 33 BRBS 41, 45 n.5; *Ezell*, 33 BRBS at 26-27.

With respect to the date from which the administrative law judge awarded claimant benefits on modification, employer argues that the administrative law judge erred in awarding benefits beginning on October 19, 1992, since claimant claimed benefits only from August 5, 1994. In a motion for reconsideration to the administrative law judge, the Director contended that the award of benefits commencing January 4, 1993, was inconsistent with the administrative law judge's finding that claimant's light duty job was not suitable. The administrative law judge noted that neither claimant nor employer objected to the Director's motion, and thus he granted reconsideration and found claimant entitled to permanent disability compensation commencing from the date of maximum medical improvement, October 19, 1992.[8]

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before the administrative law judge on modification and thus is no longer binding upon the parties. Decision and Order Denying Section 22 Modification at 3; 29 C.F.R. §18.51.

[8]Claimant did not object to any of the grounds listed in the Director's motion for reconsideration by letter dated March 2, 1999. Employer responded on March 1, 1999, to Director's motion for reconsideration. Employer disagreed with the Director that the light duty position it provided was not suitable alternate employment, but without waiving its objection or appeal rights concerning that issue, agreed with the Director that the administrative law judge's permanent disability award should be dated back to October 19, 1992.

We affirm this determination. Under Section 22 of the Act, an administrative law judge is afforded broad discretion in correcting mistakes in fact and may correct such mistakes on his own motion or on any party's motion. *See generally Aerojet-General,* 404 U.S. at 256. Thus, the administrative law judge has the authority under Section 22 to determine that claimant is entitled to permanent disability benefits for a period not claimed, based on his finding that a job was mistakenly found to be suitable. *See generally Jessee v. Director, OWCP,* 5 F.3d 723 (4th Cir. 1993). Moreover, the administrative law judge did not abuse his discretion in granting the Director's motion for reconsideration to account for claimant's entitlement to permanent, rather than temporary disability benefits prior to his discharge from the unsuitable job. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). In this regard, we note that employer had voluntarily paid claimant temporary partial disability benefits from October 2, 1992-December 13, 1992, and from December 31, 1992-January 3, 1993, and temporary total disability benefits from December 14, 1992-December 30, 1992. *See* Emp. Ex. A-2; *see also* Emp. Ex. 3A-2. The administrative law judge thus properly awarded permanent disability benefits commencing October 19, 1992, based upon his uncontested finding that claimant's condition reached maximum medical improvement on that date. Decision and Order on Remand at 7. As discussed above, however, the administrative law judge is to reconsider the extent of claimant's disability during the periods he was working.

Accordingly, the administrative law judge's Decision and Order on Remand and Decision and Order on Motion for

Reconsideration are vacated insofar as they award total disability benefits to claimant while he was working from October 19, 1992, through January 9, 1993, and from September 1993 through December 1993. The case is remanded to the administrative law judge for consideration of claimant's entitlement to disability compensation during these periods consistent with this opinion. In all other respects, the decisions are affirmed.

SO ORDERED.

/s/_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/_____
ROY P. SMITH
Administrative Appeals Judge

/s/_____
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX J

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Date: January 21, 1999

CASE No.: 1994-LHC-822
OWCP No.: 5-61489
BRB No. : 97-1371

TERRY W. CAMPBELL,

Claimant,

v.

NORFOLK SHIPBUILDING
& DRYDOCK COMPANY,

Employer,

and

RICHARD FLAGSHIP SERVICES, INC.,

Carrier.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-In-Interest.

DECISION AND ORDER ON REMAND

In a Decision and Order issued on May 22, 1997, this Administrative Law Judge held the following:

5. A mistake of fact had not been made regarding the nature and extent of claimant's condition;

6. Claimant failed to prove a change in his condition; and,

7. The motion for modification is denied.

Claimant appealed that decision. On June 17, 1998, the Benefits Review Board held the following:

1. The administrative live judge's conclusion that claimant failed to establish a change in his condition is affirmed;

2. The administrative law judge erred in his evaluation of the evidence of record when discussing claimant's assertion that a mistake of fact did occur;

3. The administrative law judge's finding that Dr. Cary G. Suter's testimony is inconsistent is vacated;

4. The case is remanded for the administrative law

> judge to reconsider the totality of the evidence of record regarding the issue of claimant's ability to perform the light duty position at Employer's facility.

On remand, therefore, the undersigned must determine whether the claimant should receive compensation for a permanent disability. The record medical evidence shows that the claimant could not perform the manipulative tasks that his employer assigned to him. For reasons discussed more fully below, the undersigned finds that the claimant should receive permanent total disability and that the employer is entitled to Section 8(f) relief.

The undersigned has already made detailed findings of fact, most of which the Board left undisturbed in its order dated June 17, 1998. Accordingly, the Court hereby adopts and incorporates most of those findings here. Having re-evaluated the totality of record evidence, however, the Court must briefly describe two findings of fact critical to this disability claim.

Central Findings of Fact

First, the record medical evidence shows that the claimant suffers from a permanent total disability. In 1992, Dr. Suter, claimant's treating physician, determined that the claimant could perform light duty work three to four hours a day, three days a week. (CX-9 at 26-27.)[1] He also found that

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[1] The following abbreviations will be used as citation to the record:

the claimant could not use hand-held equipment, operate vehicles, or otherwise drive while taking his pain medication. (CX-9 at 26-27.)

Since that time, the claimant's physical condition has not improved and the cumulative evidence indicates that the claimant is totally disabled as a result of the May 2, 1987 accident. When suffering from headaches and cervical spine pain, the claimant is unable to work. (CX-1 at 13 and CX-2A.) If he takes enough medication to control the pain and headaches, he is too sedated to work. (CX-2A.) Thus, although the claimant's condition has not deteriorated, he is unable to maintain regular employment because he still regularly suffers from vascular headaches and must take a regimen of drugs for his condition. (CX-3A at 3.)

Because the claimant's treating physician produced this evidence, and because treating physicians generally have a better understanding of their patient's conditions than evaluating physicians, the Court accords greater weight to those findings. See Honaker v. Jewel Ridge Coal Co., 12 B.R.B.S. 609, 616 (1980); see also Hensley v. WMATA, 13 B.R.B.S. 182, 194 (D.D.C. Cir. 1981)

In addition, Dr. Brian Dvorak's medical report dated

CX - Claimant's Exhibits
EX - Employer's Exhibits
Tr. - Transcript of Hearing held before Administrative Law Judge Richard K. Malamphy on September 20, 1994.

May 6, 1994, also supports the finding that claimant is totally disabled . Dr. Dvorak is a family practitioner in Spencer, Iowa. (CX-6A-3). He evaluated the claimant's disability at the request of the Disability Determination Services Bureau of Iowa. (CX-6A at 3). The Bureau decides whether claimants qualify for disability benefits such as social security. (CX-6A at 10.)

In his report, Dr. Dvorak concluded that the claimant "is completely disabled from a laborer standpoint." (CX-6A). He further stated that he did not believe the claimant "will regain the ability to return to a laborer's job." (CX-6A.) According to Dr. Dvorak, the claimant also cannot work at a "white collar or desk job" because he is illiterate. (CX-6A).

Dr. Dvorak based his conclusions on records relating to the 1987 accident and on an examination of the patient. (CX-6A at 4.) The claimant ultimately received disability benefits from the Social Security Administration. (CX-7A.) While far from dispositive, Dr. Dvorak's report is both credible and persuasive as to whether the claimant suffers from permanent total disability.

Second, the record evidence shows the employer rehired the claimant to work outside his medical restrictions and to perform tasks too physically demanding for him at the time his employer fired him. When the claimant returned to work approximately five years after his accident, the employer assigned him to light duty work in which he performed tests on drop cords and light bulbs. (Tr. at 28.)

To perform these tests, the claimant had to use hand-

held equipment including, pliers, screwdrivers and a drill. (Tr. at 28.) The claimant also had to use a drill to remove bolts from crushed light bulb protectors. (Tr. at 28.) The claimant had to use the screwdrivers and pliers to remove broken light bulbs from the casings. (Tr. at 29.) Thus, the undersigned also finds that the employer worked the claimant outside his medical restrictions, which specifically prohibited him from using hand-held equipment. (CX-9 at 26-27.)

Discussion

A claimant can receive permanent total disability benefits when he has proven that he cannot return to his usual employment due to a work related injury, and his employer has not proven that the claimant can perform suitable alternative employment. See Trans-State Dredging v. Benefits Review Bd., 731 F.2d 199, 16 B.R.B.S. 74 (CRT) (4th Cir. 1984); Blake v. Bethlehem Steel Corp., 21 B.R.B.S. 49 (1988). If the employer has re-hired the claimant, however, and later terminates the claimant for reasons unrelated to his work-related disability, the employer no longer has a duty to show other suitable alternative employment. See Brooks v. Director, OWCP, 2 F.3d 64, 27 B.R.B.S. 100 (CRT) (4th Cir. 1993).

Further, if the employer terminates the claimant from suitable alternative employment solely for violating a company rule, his disability is at most partial. See Mangaliman v. Lockheed Shipbuilding Co., 30 B.R.B.S. 39 (1996); Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II), 19 B.R.B.S. 171 (1986). A finding of partial disability means the claimant could still perform some kind of work, but the claimant would be earning less income than he would have received if he was

able to continue in his usual employment.

In the instant case, claimant was working as a rigger for employer when the May 2, 1987 accident occurred, resulting in injuries to the claimant's head, neck, and back. (Tr. at 23.) Due to these injuries, the claimant could no longer work as a rigger, which requires a high degree of mobility and heavy lifting. Claimant instead was restricted to light, limited duty three to four hours a day, three days a week, and as noted earlier, could not use hand-held equipment, operate vehicles, or drive when taking medication. (CX-9 at 26.)

On January 11, 1993, the employer fired the claimant for violating a company rule on excessive absenteeism. (EX-F7.) Thus, he was fired for a reason unrelated to his work related injuries.

The claimant, however, was not engaged in suitable alternative employment at the time his employer fired him. A job that is too physically demanding for the claimant to perform is not suitable alternative employment. See Mason v. Bender Welding & Mach. Co., 16 B.R.B.S. 307, 309 (1984). Nor is a job suitable alternative employment if it fails to meet claimant's medical restrictions. See Jameson v. Marine Terminals, 10 B.R.B.S. 194, 200 (1979). As noted above, in 1992, Dr. Suter, claimant's treating physician, authorized the claimant to perform light duty work three to four hours a day, three days a week, with no hand-held equipment or operating vehicles or driving while taking medication. (CX-9 at 26-27.)

Accordingly, since the claimant's position before his termination required him to perform many duties beyond those

mandated by Dr. Suter, the undersigned finds that the claimant was not engaged in suitable alternative employment. For example, he had to test drop cords and light bulbs by using pliers, screwdrivers and other hand-held equipment. (Tr. at 28-29.) In particular, he had to use this equipment to perform difficult manipulative tasks like removing broken glass from light bulb casings and bolts from crushed light bulb protectors (Tr. at 28-29.) The physical demands of this job resulted in claimant experiencing pain through his neck, across his shoulders, and in his hip area; it also inflamed his headaches. (Tr. at 30.) Thus, this job was not suitable alternative employment because it was too physically demanding for the claimant. Further, claimant's use of hand-held equipment to perform his job directly conflicted wit his medical restrictions.

Thus, since the claimant was fired from a job that was never suitable alternate employment, the employer has not met its burden of showing that suitable alternative employment was available to the claimant. Consequently, claimant's compensation should not be limited to partial disability where employer rehired him to perform a job that was not suitable alternative employment and did not offer any other evidence regarding such available employment outside the shipyard.

Section 8(f) Relief

Section 8(f) of the Act may be invoked by the employer to limit its liability for compensation payments for permanent disability if the following elements are present: (1) the claimant had pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due

solely to that injury, but is a combination of both that injury and the existing permanent partial disability. See Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949); McDuffie v. Eller & Co., 10 B.R.B.S. 685, 695 (1979); and Sacchetti v. General Dynamics Corp., 14 B.R.B.S. 29, 34 (1981). The employer bears the burden of proving that its Section 8(f) claim satisfies each of these elements.

A disability is considered permanent if the claimant's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. See Care v. Washington Metro. Area Transit, Auth., 21 B.R.B.S. 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. See Leech v. Service Eng'g Co., 15 B.R.B.S. 18, 21 (1982). In the present case the date of maximum medical improvement would be October 19, 1992, the day on which Dr. Suter released claimant for part time work. (CX-1 at 10).

Pre-Existing Permanent Partial Disability

In order for the employer to recover relief pursuant to the Special Fund, the claimant must have had an existing permanent partial disability at the time of the injury in question. The term disability under Section 8(f) is not limited to an economic disability under Section 8(c)(21) or one of the scheduled losses specified in Section 8(c)(1)-(20). Disability for purposes of Section 8(f) also encompasses those cases in which a claimant has a serious physical disability which would motivate a cautious employer to dismiss the claimant because

of a greatly increased risk of employment-related accident and compensation liability.

In the present case, the claimant was suffering from a permanent partial disability before his May 2, 1987 accident. Claimant suffers from bilateral hearing loss an wears hearing aids. Claimant received a ten percent disability for a hearing loss that he sustained during his military service. (See Army records dated 7/16/75, 3/27/79, 4/3/79, 5/3/79 and 7/12/79; records of Hampton VA Medical Center dated 8/28/85, 8/29/85, 10/3/85, 10/7/85, 10/17/85, 4/30/87, 5/5/87, 5/15/87, 8/31/87 and 3/21/88.)

Manifest to the Employer

The employer need not have actual knowledge of the pre-existing disability, constructive knowledge will satisfy the requirement. Constructive knowledge may be proved from medical records in existence at the time of the subsequent injury from which the condition was objectively determinable. See De Nichilo v. Universal Terminal & Stevedoring Corp., 575 F.2d 452 (1978).

Here, medical records showing that the claimant suffered from bilateral hearing loss were in existence prior to the May 1987 accident. (See Army records dated 7/16/75, 3/27/79, 4/3/79, 5/3/79 and 7/12/79; records of Hampton VA Medical Center dated 8/28/85, 8/29/85, 10/3/85, 10/7/85, 10/17/85, 4/30/87, 5/5/87.) Thus, the manifestation requirement is fulfilled because the employer had constructive knowledge of the permanent partial disability.

Contribution to Permanent Total Disability

The pre-existing permanent partial disability must combine with work-related injury to result in the permanent total disability. The employer must prove that the second injury by itself would not have led to total disability. See Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 B.R.B.S. 24 (CRT) (5th Cir. 1990). In the instant case, the claimant can no longer work as a laborer because of the injuries he received from the May 1987 accident. (See CX-1 at 4 and CX-2 at 1.) The claimant, however, is also prevented from performing other work due to this permanent hearing loss that existed prior to the May 1987 accident. Absent this hearing loss, the claimant could, for example, work as a dispatcher or in telephone sales. Thus, the claimant is totally disabled because of a combination of the injuries related to the May 1987 accident and the pre-existing hearing loss.

Conclusion

The claimant cannot return to his usual employment, and the employer has not shown that suitable alternative employment is available to him. Therefore, the claimant has proven that he is entitled to permanent total disability. In addition, the employer is entitled to Seetion 8(f) relief because it has shown that the claimant suffered from a permanent pre-existing injury that contributed to his total disability.

ORDER

1. Claimant achieved maximum medical improvement as of October 19, 1992.

2. Claimant is entitled to permanent total disability benefits at the compensation rate of $424.07 per week from January 4, 1993 and continuing.

3. Upon the expiration of 104 weeks after October 19, 1992, compensation shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944.

4. The employer shall receive credit for all compensation that has been paid. (A Form LS 208 indicates that various forms of compensation were paid through January 3, 1993.)

5. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 B.R.B.S. 267 (1984).

6. All computations are subject to verification by the District Director.

7. Claimant's attorney within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections

thereto.

/S/
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kal
Newport News, Virginia

APPENDIX K

U.S. Department of Labor
Benefits Review Board
BRB No. 97-1371

TERRY W. CAMPBELL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: 06/17/1998
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION	)	UNPUBLISHED
	)	
and	)	
	)	
RICHARD FLAGSHIP SERVICES INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	

DECISION and ORDER

Appeal of the Decision and Order Denying Section 22 Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr., and Matthew H. Kraft (Rutter &

Montagna, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Section 22 Modification (94-LHC-822) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §§921(b)(3).

On May 2, 1987, claimant sustained a broken cheek bone and compressed jaw bone during the course of his employment with employer while taking a front cover off of a boat davit casing. Claimant thereafter was diagnosed with a cervical strain and vascular headaches; in October 1992, Dr. Suter, claimant's treating physician, limited claimant to part-time light-duty work with no heavy lifting and no use of hand-held equipment. Employer voluntarily paid claimant temporary total disability compensation, 33

U.S.C. §§908(b), and temporary partial disability compensation, 33 U.S.C. §§908(e), for various periods of time between May 1987 and January 1993. Claimant was terminated by employer on January 9, 1993, due to excessive absenteeism. Thereafter, claimant filed a claim for benefits under the Act seeking temporary total disability compensation. In addition, claimant alleged that employer violated the provisions of Section 49 of the Act, 33 U.S.C. §948a, by terminating him.

In his initial Decision and Order, the administrative law judge found that employer did not violate Section 49 of the Act when it terminated claimant. Next, having found that claimant established causation and a *prima facie* case of total disability, the administrative law judge determined that employer established the availability of suitable alternate employment by virtue of claimant's return to a light-duty position with employer, and, as claimant was terminated for violating a company rule, the administrative law judge denied claimant's claim for temporary total disability compensation. Claimant filed a motion for reconsideration with the administrative law judge, contending that the administrative law judge failed to consider whether he was entitled to temporary partial disability benefits. In an order issued on June 12, 1995, the administrative law judge, relying on *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), denied claimant's motion. Claimant thereafter filed a motion for modification alleging both a change in condition and a mistake of fact and seeking permanent total disability compensation.

In his decision addressing claimant's motion for modification, the administrative law judge found that a mistake of fact had not been made regarding the nature and extent of claimant's condition, and that Dr. Suter's 1996 deposition was insufficient to compel modification based on a change in condition, since Dr. Suter testified that claimant's condition had not changed in the previous three or four years. The administrative law judge further found that Dr. Suter's testimony regarding the extent of claimant's disability was inconsistent. Thus, the administrative law judge denied claimant's motion for modification.

On appeal, claimant contends that the issue of permanent total disability was not specifically before the administrative law judge in the initial hearing, and that, based on Dr. Suter's 1994 and 1996 opinions, claimant is now permanently and totally disabled from any employment. Claimant additionally alleges a mistake of fact, asserting that the administrative law judge's initial finding that claimant was capable of performing the light duty position at employer's facility was in error. Employer responds, contending that the administrative law judge's findings are supported by substantial evidence, and that the matter on modification is barred by the doctrine of *res judicata*.

Section 22 of the Act, 33 U.S.C. §§922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1

(CRT)(1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When considering a motion for modification, the administrative law judge is permitted to have before him the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to obtain modification for a mistake of fact, however, the modification must render justice under the Act. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). *See also Rambo*, 515 U.S. at 291, 30 BRBS at 1 (CRT). Moreover, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *See Rambo*, 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Vasquez*, 23 BRBS at 431.

We initially reject claimant's assertion that the administrative law judge erred in concluding that claimant did not establish a change in his condition. In rendering his decision, the administrative law judge found that Dr. Suter, in his 1996 deposition, stated that claimant's condition had not changed in the previous three or four years. *See* Cl. Ex.

1A at 14. The administrative law judge thus concluded that claimant failed to establish a change in his condition based upon this physician's testimony. As the administrative law judge's finding regarding this issue is rational and supported by substantial evidence, it is affirmed. *See generally General Dynamics Corp. v. Director, OWCP,* 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

We agree with claimant, however, that the administrative law judge erred in his evaluation of the evidence of record when discussing claimant's assertion that a mistake in fact had occurred. In his initial decision, the administrative law judge, in discussing the extent of claimant's disability, acknowledged that claimant's light-duty post-injury job involved disassembling broken lamp guards by using a hand-held electrical drill and lifting heavy drop cords, even though claimant was restricted by Dr. Suter from both heavy lifting and the use of hand-held equipment. *See* Emp. Exs. 2 at 35, 6 at 16. The administrative law judge further noted claimant's uncontradicted testimony that he had trouble performing this light-duty position, and that he suffered from headaches due to the lifting, bending and stooping which he was required to perform. *See* Decision and Order at 10, 17. The administrative law judge concluded, however, that since claimant filed a grievance with regard to his having to work outside his restrictions but failed to attend the hearing, and since claimant never complained about the physical requirements of this position to his supervisor, the light-duty position which claimant was performing post-injury constituted suitable alternate employment since claimant was able to perform this job for employer and the job did not constitute sheltered employment.

In support of his motion for modification, claimant submitted into evidence the 1996 deposition of his treating physician, Dr. Suter. In October 1992, Dr. Suter released claimant to work part-time, three to four hours a day, three days a week, in a light-duty position, with the restrictions of no heavy lifting and no use of hand-held equipment. *See* Emp. Exs. 2 at 35, 6 at 16. Claimant subsequently complained of headaches and physical discomfort. As a result of these ongoing complaints, Dr. Suter re-evaluated claimant's condition and opined, in a September 1994 report, that claimant's vascular headaches rendered him disabled from any work, either sedentary or physically active. Cl. Ex. 2A. Dr. Suter deposed in 1994 that claimant was physically unable to handle employer's light duty position because of his headaches and the medication he was taking, that claimant is not fitted for any job in the regular market due to his physical complaints and lack of education, and that claimant is permanently disabled from any type of employment. Emp. Ex. 6 at 23-24. At his 1996 deposition, Dr. Suter reaffirmed his 1994 opinion, commenting only that prior to 1994 he had released claimant for part-time work with physical limitations. Cl. Ex. 1A at 14.

The administrative law judge, on modification, determined that Dr. Suter's testimony was not sufficient to compel modification since, he concluded, Dr. Suter has rendered inconsistent opinions regarding the extent of claimant's disability. Contrary to the administrative law judge's statement, Dr. Suter's testimony is not inconsistent; rather, Dr. Suter's change of opinion in 1994 regarding claimant's ability to work, and his restatement of that opinion

in 1996, takes into consideration his ongoing treatment of claimant and reflects the progression of this diagnoses of claimant's condition subsequent to his work-injury. Accordingly, the administrative law judge's finding that Dr. Suter's testimony is inconsistent is vacated, and the case is remanded for the administrative law judge to re-consider the totality of the evidence of record regarding the issue of claimant's ability to perform the light-duty position at employer's facility.[2] *See* 5 U.S.C. §§557(c)(3)(A); 33 U.S.C. § 919(d); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).[3]

Accordingly, the Decision and Order Denying Section 22 Modification is vacated, and the case is remanded for reconsideration consistent with the opinion herein.[4]

SO ORDERED.

/s/_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/_____
ROY P. SMITH
Administrative Appeals Judge

/s/_____
JAMES F. BROWN

Footnotes.

1) Employer's argument that this matter should be barred by the doctrine of *res judicata* is rejected, as it is well-settled that Section 22 displaces traditional notions of *res judicata*. *See Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984), *citing Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968).

2) We note that the administrative law judge on modification additionally failed to consider the May 6, 1994, report of Dr. Dvorak, which is supportive of Dr. Suter's opinion regarding the extent of claimant's disability. On Remand, the administrative law judge must address this report in considering this issue. In addition, if claimant is not totally disabled, the administrative law judge must determine whether claimant is entitled to partial disability benefits, either permanent or temporary, as a claim for total disability benefits includes any lesser degree of disability. *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985). In this regard, if claimant's job at employer's facility was suitable, an award of partial disability must be based on a comparison of claimant's average weekly wage and his wage-earning capacity in the job at employer's facility; since claimant lost this post-injury job due to his violation of a company rule, under *Brooks*, if the job was suitable, employer does not bear the renewed burden of proving suitable alternate employment after the termination. However, any loss in wage-earning capacity in that job

continues. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 17 (1980). Thus, in view of the fact that this position was part-time and as employer was making voluntarily payments of temporary partial disability benefits, it appears that claimant may have had a loss in wage-earning capacity in the alternate job provided, and the administrative law judge must consider whether claimant remains entitled to partial disability benefits. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

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3) If, on remand, the administrative law judge determines that claimant suffers from a compensable permanent disability, he must address whether employer is entitled to Section 8(f) relief.

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4) Employer's request for Section 26 penalties was made in a response brief, not a cross-appeal, and thus, such a request is not ordinarily considered on appeal. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). In any event, employer's request is rejected, as neither the Board nor an administrative law judge has the authority to award fees and costs under Section 26 of the Act. *See Boland v. Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993); *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997).

APPENDIX L

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Date: May 22, 1997

CASE No.: 1994-LHC-822
OWCP No.: 5-61489
BRB No. : 97-1371

TERRY W. CAMPBELL,
Claimant,
v.
NORFOLK SHIPBUILDING
& DRYDOCK COMPANY,
Employer,
and
RICHARD FLAGSHIP SERVICES, INC.,
Carrier.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER DENYING SECTION 22 MODIFICATION

This proceeding arises from a claim for permanent total disability under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. A formal hearing was held in Newport News, Virginia on December 12, 1996, at which time all parties were afforded full

opportunity to present evidence and argument as provided in the Act and the applicable regulations. Claimant and Employer participated in the hearing and submitted post-hearing briefs.

At the haring CX 1A[1] through CX 7A; EX A through EX H; and EX 4 through EX 10, were submitted into evidence. Among the exhibits admitted into evidence were the transcript and exhibits from a prior hearing before the undersigned, held on September 20, 1994, involving the same parties. In that proceeding, Claimant sought temporary partial and temporary total disability benefits arising out of the same work injury. Claimant also raised a Section 48(a) claim - discriminatory discharge.

In a Decision and Order issued May 5, 1995, it was held that Section 48(a) had not been violated. Claimant's condition, however, was found to be related to his My 1987 work injury. It was further held that Claimant established a prima facie case of total disability by proving that he was unable to perform his usual pre-injury employment because of the work related injury. The Employer, however, rebutted the finding of total disability by demonstrating suitable alternative employment through a job in its facility. Claimant was discharged from this suitable alternative employment for willful misconduct -

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[1] The following abbreviations will be used as citation to the record:

CX - claimant's exhibit (December 12,1996 hearing);
EX - employer's exhibit;
C - claimant's exhibit (September 20, 1994 hearing), and;
Tr. - transcript.

excessive absenteeism - that was unrelated to his industrial injury. Consequently, Claimant was found not entitled to disability benefits.

On May 19, 1995 Claimant filed a Motion for Reconsideration, contending that there was no finding in the May 5, 1995 Decision and Order regarding Claimant's entitlement to temporary partial disability. That Motion was denied on June 12, 1995.

Claimant has returned to this Court seeking a Section 22 modification award for permanent total disability benefits arising out of the May 2, 1987 work injury.

The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The parties have stipulated to the following:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;
2. An employer/employee relationship existed during all relevant times;
3. Claimant sustained an injury arising out of and in the course of his employment on May 2, 1987;
4. There was a timely notice of injury;
5. The Claimant's average weekly wage at the time of his work-related injury was $636.11, which yields a

compensation rate of $424.07;

6. Claimant has received 281 weeks and 1 day of temporary total disability compensation at that rate;

7. Claimant received 15 weeks of temporary total disability compensation;

8. Claimant has not received any disability compensation since January 7, 1993; and

9. Claimant was terminated by Employer effective January 13, 1993 for failure to call in for five consecutive days of unexcused absence from work, known as the 5-day rule.

ISSUES

1. Whether, as a Section 22 modification, Claimant is entitled to permanent total disability benefits from August 5, 1994 and continuing.

2. If Claimant is entitled to permanent total disability benefits, whether Employer is entitled to Section 8(f) relief.

3. Whether employer is entitled to Section 26 penalties.

CONTENTIONS

Claimant, Terry Campbell, contends that the issue of permanent total disability as of August 5, 1994 was not before this Court when the orders of May 5 and June 12, 1995 were handed down. Based on the uncontradicted reports and testimony from Claimant's treating physician, it is Claimant's position that a Section 22 modification should be awarded granting permanent total disability benefits.

Employer, Norfolk Shipbuilding & Drydock Company (Norshipco), argues that the issue of total disability has already

been adjudicated, and is thus barred by the doctrine of res judicata. Furthermore, Employer contends that there is no basis for a Section 22 modification, because Claimant's physical or economic condition has not improved or deteriorated since the prior Decision and Order in this matter. Under Section 26 of the Act, Employer asks that costs of the proceeding be assessed against the Claimant, because the matter was instituted and continued without reasonable grounds.

EVALUATION OF THE EVIDENCE

The findings of fact were fully addressed in the Decision and Order issued May 5, 1995. In summary, these findings were:

Claimant suffered a work related injury, which rendered him unable to perform his usual pre-injury employment. His treating physician reported that Claimant would work a light duty position, on a part time basis, in Employer's facility. Claimant was eventually fired from this light duty work for excessive absenteeism and failure to follow standard shipyard rules requiring the employee to contact the shipyard if he or she is going to be absent from work.

In the December 12, 1996 hearing, Claimant testified that he is now living in Iowa. (Tr. 18). He has not worked since the September 20, 1994 hearing in this case.. (Id.). He is still being treated by Dr. Cary Suter. (Tr. 19).

William Moore, materials manager at Norshipco, also testified at the December 12, 1994 (Tr.28). He stated that he is in charge of the warehouses, storerooms, safety and tool rooms and a temporary service rental group, which is where

light duty personnel are used. (Id.). He testified that the light duty work that has been available to Claimant in September 1994 has existed sine that time, and still exists. He indicated that if Claimant had not been fired, Norshipco would be able to accommodate his restrictions. (Tr. 29).

Dr. Gary Suter was Claimant's treating physician for his work injury. While under Dr. Suter's care, Claimant was authorized to perform light duty work three to four hours a day, three days a week, with no hand held equipment or operating vehicles or driving while taking medication. (EX 2 at C 9(26-27)). Dr. Suter indicated by letter dated October 19, 1992, that Claimant could continue working if he performed light duty for 20 hours per week. Dr. Suter did not feel that it would be a problem for Claimant to work at the Shipyard. Dr. Suter stated that Claimant could have done the light duty work at the Shipyard as Dr. Suter understood it: Claimant could work half time, and though he might miss days because of the headaches, he was able to work. (Suter Deposition, p. 60).

By letter dated January 5, 1994, Dr. Suter wrote that Claimant's condition is no better, and may have worsened because he has been without medication. Dr. Suter stated, "In any case, as I have set forth previously in notes, he is disabled for any but light work, and light work only four hours a day." The disability was permanent, according to Dr. Suter. (EX 22 at C 1(2)).

By report dated August 5, 1994, Dr. Suter opined that Claimant is completely disabled from any regular employment, and that this disability would be permanent. (EX 22 at C1(1)).

In a deposition taken December 4, 1996, Dr. Suter stated that he examined Claimant on January 10, 1995 and February 29, 1996. (CX 1A at 5-6) When asked if there any change in his findings regarding Claimant's condition, Dr. Suter responded:

> Not really. He had been this way for some while. He had had trouble with his neck and arm pain. He had post-traumatic headaches, and it might be that he had a little more trouble with his blood pressure, but it wasn't a lot. His biggest troubles were post-traumatic headaches and his neck and arm pain, and that had been that way for quite a long time. (CX 1A at 5).

Dr. Suter was asked:

Q Doctor, is it still your opinion as you expressed in August 1994 that Mr. Campbell is permanently disabled from work?

A Yes. (CX 1A at 7).

Later in the deposition, Dr. Suter discussed the difference between Claimant's condition and work limitations now as opposed to when this claim was originally decided in May 1995:

Q Now when you saw Mr. Campbell in January of '95, I think you told Mr. MacBeth his condition was basically unchanged from August 5th of '94.

Backing up to December 6th of '93 when you saw him, at that point you gave the opinion that his condition was permanent. Was his condition in August of '94 basically unchanged over 12-6 of '93?

A I can't see that he's been unchanged.

Q Been stable for the lat three or four years?

A Yeah. Now and then when we come up with new headache medicines, they shorten his attacks some, but they haven't changed his situation.

Q And your opinion as far as his work ability is the same as it was in that deposition of November of '94?

A Yes. The idea was that the really wasn't able to work, and if he could work, it would have to be part-time light work. He wasn't a tremendously educated person, so the possibility of super mental rehabilitation was probably part of the plan. (CX 1A at 14).

In a letter to David Fetters of Disability Determination Service Bureau, dated September 22, 1994, Dr. Suter indicated that Claimant's condition had been present for six or seven years and it was of a degree that renders Claimant permanently

disabled. The vascular headaches were such, in Dr. Suter's opinion, that they would incapacitate Claimant from any work, whether it was sedentary or physically active. (CX 2A)[2].

Dr. Suter wrote to Dr. Dvorak on February 29, 1996 that he felt Claimant was allowed to live an almost normal life, though unable to work a regular job. (CX 4A).

Dr. Brian Dvorak, board certified in family practice, was deposed on December 6, 1996. (CX 6A at 7). Dr. Dvorak examined Claimant on April 20, 1994; July 21, 1996; and August 27, 1996. This latter two examinations were follow-up visits for injuries Claimant sustained after falling off of a ladder on July 20, 1996. (Id.) Dr. Dvorak stated that it was his understanding that Claimant was not experiencing vascular headaches prior to his 1987 work accident. When Dr. Dvorak saw Claimant for the first time in 1994, Claimant was still experiencing headaches, which were apparently identical to the ones that occurred after the 1987 accident. (CX 6A at 12). Dr. Dvorak stated that he also based his conclusions on the fact that Dr. Suter had previously diagnosed Claimant with post-traumatic headache syndrome. (CX 6A at 13).

The Social Security Administration rendered a decision finding Claimant disabled as defined by the Social Security Act and Regulations since May 2,1987, and entitling Claimant to monthly disability benefits. (CX 7A).

DISCUSSION

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[2] This exhibit was also submitted at the September 20, 1994 hearing (C9 at 43).

Claimant is asking for a modification of the Decision and Order issued May 15, 1995. Section 22 of the Act, states that a Claimant may, within one year of the rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. §922. In this case, I find neither a change in condition nor a mistake of fact to warrant the entry of a modification awarding benefits.

The Benefits Review Board has held that modification based on a change in condition is granted where the Claimant's physical condition has improved or deteriorated following entry of the award but before the request for modification. See Rizzi v. Four Boro Contracting Corp., 1 B.R.B.S. 130 (1974). In this case, Dr. Suter has consistently indicated that Claimant's condition has not changed for better or worse. In his most recent deposition, Dr. Suter agreed that Claimant's condition has not changed in the last three or four years. In other words, Claimant's condition s not different now than it was at the time of the original Decision and Order. Consequently, Claimant's request for modification shall not be granted based on a change in condition.

A mistake of fact is also a basis for a Section 22 modification. The standard for obtaining a modification for mistake of fact is the same as that for all modification proceedings; it must render justice under the Act. An allegation of mistake of fact, however, should not be allowed to become a back door route to retry a case. O'Keefe v. Aerojet-General Shipyards, 404 U.S. 254, 255-56 (1971). The finder of fact has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially

submitted. O'Keefe, 404 U.S. 254. The Board has held that facts relating to the nature and extent of disability have been deemed a proper subject of modification proceedings. Allan v. Strachan Shipping Co., 11 B.R.B.S. 864 (1980); Steele v. Associated Banning Co., 7 B.R.B.S. 501 (1978).

In this case, Claimant contends that he suffers from permanent total disability based upon the medical reports and testimony of his treating physician. While the subject matter, the nature and extent of Claimant's disability, is proper for a modification proceedings, I do not find a mistake of fact upon which to base an award under Section 22 modification. The relevant and material evidence was weighed in the original Decision and Order of May 5,1995 and when the Motion for Reconsideration was denied on June 12, 1995. Claimant is asking that I revisit Dr. Suter's statements concerning the extent of Claimant's disability. Those statements were part of the record when the May 5, 1995 Decision and Order was issued. Further reflection upon that same evidence in combination with Dr. Suter's 1996 deposition does not change matters[3].

I do not find Dr. Suter's conclusions sufficient to compel modification. Dr. Suter has given inconsistent opinions regarding the extent of Claimant's disability. In some

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[3] The only new medical evidence, i.e. post May 1995, that touches on the subject of Claimant's disability is a deposition of Dr. Dvorak, Claimant's physician in Iowa (CX 6A); Dr. Suter's letter to Dr. Dvorak dated February 29, 1996 (CX 4A); and the December 4, 1996 deposition of Dr. Cary Suter (CX 1A).

instances, he indicated that Claimant is capable of working light duty, part-time work in Employer's facility. In other instances, he stated that Claimant is totally disabled. Dr. Suter's 1996 deposition indicates that Claimant's "total disability" is qualified by the fact that if Claimant is not totally disabled, then he is only capable of working part time, light duty work. The weight of evidence points to the conclusion that Claimant is disabled by hi work injury, but that he was capable of performing light duty, part-time work in Employer's facility. As sufficiently treated in the original Decision and Order, Claimant no longer works in Employer's facility, because he violated a Shipyard rule against excessive absenteeism.

Claimant contends that the issue of permanent total disability as of August 5, 1994 was not before the Administrative Law Judge at the time of the original Decision and Order. While Claimant did not specifically seek permanent total disability benefits at that time, the issue of total disability was considered and decided. Based upon Dr. Suter's conclusions, it was held that Claimant could not return to his original pre-injury work, but that Claimant was able to do part-time, light duty work at Employer's facility. Thus, as adequately considered in the original Decision and Order, Claimant established a prima facie case of total disability. Employer rebutted the finding of total disability by providing Claimant with a position in its facility. Re-examination of evidence from the initial hearing in this matter and of subsequently submitted evidence does not alter these conclusions. Finally, Claimant was discharged for willful misconduct from the suitable alternative employment in Employer's facility. Thus, he was not, and still is not, entitled

to disability benefits under the Act.

The issue of permanency is likewise unaffected. Dr. Suter has consistently indicated that Claimant's condition has been unchanged since some time before the September 1994 hearing. In fact, he agreed that Claimant's condition has been unchanged for the last three or four years.

As no benefits are awarded, Employer's request for Section 8(f) relief is not considered at this time. Furthermore, I find that Employer is not entitled to Section 26 penalties as the request for modification was not totally frivolous in view of recent medical statements.

It is noted that at the Department of Labor hearing in 1994, the Claimant testified that he returned to work for the Employer in 1992 and continued until he was discharged in 1993. However, in the decision in August 1995, the Social Security Administration administrative law judge determined that the Claimant had been disabled since November 1987. The social security claim was apparently filed in February 1994, and presumably benefits were not paid for more than 12 months prior to that date. This matter may be ripe for further consideration by the Social Security Administration.

ORDER

The claim of Terry W. Campbell is DENIED.

/s/_____
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/STK/ccb
Newport News, Virginia

APPENDIX M

Office of Administrative Law Judges
United States Department of Labor

IN THE MATTER OF TERRY W. CAMPBELL
CLAIMANT,
v.
NORFOLK SHIPBUILDING AND DRY DOCK
COMPANY EMPLOYER/SELF-INSURED
Case No. 94-LHC-822
OWCP No. 5-61489
May 5, 1995

Appearances:

Robert J. Macbeth, Jr., Esq.
For the Claimant

F. Nash Bilisoly, Esq.
For the Employer

BEFORE: RICHARD K. MALAMPHY, Administrative Law Judge

DECISION AND ORDER

This proceeding arises from' a claim for benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, et seq.

A formal hearing was held in Newport News, Virginia on September 20, 1994, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable

regulations. The Employer and the Claimant appeared at the hearing, and submitted post-hearing briefs.

The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent. [FN1]

STIPULATIONS

The Employer and Claimant stipulated to the following facts at the hearing, [FN2] and I find:

1. There was an employer/employee relationship.
2. There was timely notice of an injury.
3. There was a timely controversion of the issues disputed between the parties.
4. Claimant was injured on May 2, 1987.
5. Claimant's average weekly wage at the time of the injury was $636.11, which yields a compensation rate of $424.07 per week.

6. Claimant has received payment of 281 weeks and one day of temporary total disability compensation benefits at that rate and 15 weeks of temporary partial disability compensation.
7. If it is found that the Claimant was able to perform 20 hours of light work per week, then the Claimant would have received a loss of $423.11 in weekly income, yielding a temporary partial compensation rate of $282.07.
8. Compensation has not been paid to the Claimant since January 7, 1993. Suspension of benefits occurred at this time as Claimant was terminated from his employment with the Employer on that date.

9. Claimant was terminated by the Employer effective January 13, 1993, for failure to call in on five consecutive days of absence from work, known as the Five Day Rule, and that the Employer uniformly applied this policy regardless of an employee's status as disabled or filing a claim under the Longshore and Harbor Workers' Compensation Act.

10. Norfolk Shipbuilding and Dry Dock Corporation is an enterprise engaged in the repair of ships located on the southern branch of the Elizabeth River in Norfolk Virginia, the Elizabeth River being a navigable waterway of the United States, that the injury in question occurred in the course and the scope of the Claimant's employment, and occurred within the confines of the Shipyard facility.

11. From the period of Claimant's discharge to the present, the Employer had available for the Claimant light work, within Claimant's medical restrictions, that the Claimant could perform. (Tr. 16).

ISSUES

1. WHETHER THE EMPLOYER EXPRESSED A DISCRIMINATORY ANIMUS WHEN IT REQUIRED THE CLAIMANT TO REPORT FOR LIGHT DUTY WORK BETWEEN OCTOBER 1992 AND JANUARY 1993?

2. WHETHER THE CLAIMANT IS ENTITLED TO RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 9, 1993 THROUGH THE PRESENT AND CONTINUING?

FINDINGS OF FACT

Claimant Terry Campbell,"Claimant," (born on

October 19, 1952), began working as a rigger for Norfolk Shipbuilding and Dry Dock Company, "Norshipco" or "Employer," in September 1986 (Tr. 23). The Claimant suffered an injury to his head, neck and back at work on May 2, 1987, while he was taking a front cover off of a boat davit casing. (TR-23). He was admitted to Norfolk General Hospital for about four to six days. His cheek bone was broken, his jaw bone was compressed so that he could not open his mouth his neck hurt down to the middle of the shoulder blades, and his hip area in the center of his back felt spongy. (TR-24). The Employer paid the Claimant temporary total disability compensation and permanent partial disability compensation at different times between May 1987 and January 1993. (EX-A2). The Claimant claims that when the Employer terminated his employment on January 9, 1993, the Employer acted in violation of Section 49 of the Act because the Employer fired him in retaliation for his filing of a claim for disability compensation. The Claimant seeks temporary total disability compensation from January 9, 1993, the day after he was fired by the Shipyard, to the present and continuing.

After the Claimant's 1987 injury, Dr. Suter, Claimant's treating physician, indicated in a 1990 note to Dr. Geib, the Shipyard medical director, that Claimant had a diagnosis of chronic cervical strain, and that the Claimant should accordingly be restricted to fight, limited duty three to four hours a day, three days a week, with no hand-held equipment or operating vehicles, or driving when taking medication. (CX-9 at 26). Subsequently, on October 19, 1992, Dr. Suter opined in a letter to Claimant's attorney that Claimant was capable of working twenty hours a week, as long as it was light work. (CX-9 at 34). Dr. Suter authorized

Dr. Geib by a note dated December 2, 1992, to provide Claimant with a fight duty position, with the restriction that Claimant could perform light duty work four hours a day with no hand-held equipment. (CX-9 at 35).

Pursuant to this restrictions, Claimant was given the job of performing tests on drop cords and light bulbs. (TR-29). Claimant testified that this work required the use of hand-held equipment such as pliers, screwdrivers, and a drill to remove light bulbs that had broken off inside the protectors or the housing. (TR-29). Claimant said that this work caused him problems, and sometimes the other men around would help him lift the drop cords. (TR-29). The motions of using the hand-held equipment, and the stooping and bending, caused pain in his neck, across his shoulder blades and in his hip. This would inflame his headaches, requiring medication for the pain. (TR-30).

Claimant said that the medications made him drowsy, so that he would fall asleep on the job sitting in the chair. While he was on light duty, his supervisor and others would let him sleep. (TR-31). Claimant explained that he worked as many days as he could, and on the days when he did not go in, he would have severe headaches or lower back pain that prevented him from moving. He was on so many medications that he couldn't go anywhere during those periods. (TR-31).

Claimant did not have a phone at his residence when he went back to work in October 1992. (TR-3 1). The closest phone was at the 7-Eleven, approximately a mile and a half away from his house, and the Claimant did not have any neighbors around to ask if he could use their phone. (TR-32, 92). On the days that he was unable to go to work, Claimant

testified that he did not call in because if he had been well enough to go to the 7-Eleven to call then he would have been well enough to go to work. According to Claimant, he informed Mr. White, his supervisor, Mr. Smith and Dr. Geib that he did not have a telephone. (TR-32).

Claimant said that he did not know about Norshipco's rule requiring employees to call in if they were unable to work. (TR-33). Claimant believed that it was the Employer's responsibility to check on him if he missed over three days of work. (TR-53). He was aware that he had been written up for violating some rules at Norshipco such as not coming in to work on time. (TR-33). Claimant admitted that his supervisor counseled him on several occasions between October and December 1992, to call in if he was going to be absent. (TR-67). However, the Claimant stated later in his testimony that Mr. White never warned him that he would lose his job if he could not get to work on time, and that he was never suspended from work or docked any pay for his absence or tardiness prior to his termination. (TR-82).

When Claimant was terminated on January 9, 1993, he had been absent from January 4, 199:3 through January 8, 1993, and had failed to call in during that time. (TR-68). Claimant found out he was terminated on January 9, 1993, when he had already come in to work and had gotten a slip to go to first aid. Mr White came to him in first aid that day and told him that he was supposed to clear out. (TR-82). After his termination, Claimant tried to get a couple of different jobs but was not successful in working at these jobs. (TR-36). He worked for Savage Builders in Newport News from September to December 1993 for minimum wage under his doctor's restrictions. (TR-37). Claimant testified that he has

not worked anywhere else since leaving Savage Builders in December 1993. (TR-38). Claimant has since moved in with his parents in Iowa and filed for supplementary social security. (TR-75).

The Claimant testified that he had never had headaches for which he sought treatment prior to his 1987 injury. (TR-41, 43). He only began having problems with headaches on May 2, 1987. While he was in the hospital after his injury, he was given pain medication to relieve the headache, and after the operation on his face, the headaches got worse. Claimant continues to have these headaches on a daily basis. (TR-4 1).

Claimant sustained an injury to his left shoulder in 1978, while he was in the Army. (TR-50-51). Claimant denied that he still has back pain as a result of that injury. (TR-51). Claimant also denied that he had ever been to the Veterans Administration Hospital for a headache workup. (TR-50). However, Claimant's Veteran's Administration Hospital records indicate that Claimant complained of persistent headaches and pains in his back on February 4, 1980. (EX-HI). Claimant's records reveal that Claimant also reported frequent headaches in February 1981, October 1984, February 1985, and February 1986. (EX-H).

With regard to Claimant's medications, Dr. Suter advised Claimant as to which medications were safe to take if Claimant would be driving. (TR-55). Dr. Suter indicated by letter dated October 19, 1992, that Claimant was capable of driving an hour at a time. (CX-1 at 10). However, Dr. Suter opined by letter dated August 5, 1994, that "if [Claimant] takes medicine to surmount the pain, [the

medicine] often produces a degree of sedation which makes it unwise for Claimant to drive or work. (CX-1 at 12). As well, Dr. Geib, Norshipco's medical director, refilled some prescriptions for Claimant and gave him other instructions. (TR-58). At one point, Claimant was arrested and charged with driving under the influence while he was on his medications. (TR-59). Because of his conviction, Claimant's license was suspended for year. (TR-60). Claimant declined to get his driver's license back after he surrendered it because he said he never used it. (TR-63).

Claimant testified that he requested that the Shipyard facilitate a carpool arrangement for him to, get back and forth to work. (TR-27). Claimant was living approximately 40 miles away from Norshipco. He drove himself to work because Norshipco did not provide transportation for him. (TR-26). Dr. Geib and Winston Smith, Shipyard officials, were working on getting the Claimant a list of employees in the Gloucester area, however, Claimant's restriction that he could only work four hours per day meant that he would have to return home by taxi. Claimant said, "I was living too far for them to take me back in a taxi. So I had to drive." (TR-27).

During the period between October 1992 and January 1993, when Claimant was performing fight duty work, Claimant complained to his union that the Employer was working him outside of his restrictions. (TR-69). Claimant believed that his union steward filed a grievance on his behalf. (TR-70). Claimant did not follow up on the union's action regarding this matter, and he did not know what the union did for him. (TR-70). Claimant did recall that a grievance hearing was scheduled for February 9, 1993, and

that he did not show up. (TR-72). When the hearing was rescheduled for March 5, 1993, Claimant again failed to attend, and his grievance was accordingly dismissed. (TR-73).

Duane J. White, Supervisor, Norfolk Shipbuilding and Dry Dock Co.

During the period of Claimant's light duty work at the Shipyard, between October 1992 and January 1993, Duane White was the supervisor of the light duty shop. (TR-146). The purpose of the shop was to provide work for employees who had light duty restrictions based on referrals from the Shipyard clinic. (TR- 147). Mr. White explained that as the supervisor of the light duty shop he made an effort to compensate for his employee's medical restrictions and tried to be lenient with others because of their restrictions. Some people who work in the shop have no restrictions, and they are available to help the other employees with some tasks. (TR-148).

When Claimant came to work in the shop, Mr. White set him up at a work station fixing electrical lights and extension cords. (TR-148). In this work station Claimant was free to sit or stand as needed. (TR-148). Claimant's job involved disassembling broken lamp guards using a hand-held electrical drill and putting on new guards. (TR-149-50). Claimant was told that if he needed help lifting the heavy extension cords, he should get help from the man that was in the station next to him . (TR-150). When Claimant felt bad or felt that he could not work, Mr. White told him to go back in the corner and take a break for as long as he needed. (TR-150). Mr. White knew that Claimant's medication would

make him drowsy at work on occasion. When this occurred, Mr. White permitted Claimant to go off to the side to rest. (TR-156).

In this job Claimant was subject to the same collective bargaining agreement and company rules as other employees. (TR-150). Company rules required that Claimant come to work at 7:15 a.m., and if he was unable to come in, that he should call his supervisor to inform him. (TR-151). Mr. White had a problem with Claimant being late or absent on several occasions. He counseled Claimant in that regard. (TR- 151). Mr. White knew that Claimant was taking medication which caused him to become sleepy, so White did not write Claimant up for tardiness until Claimant was a few hours late without Calling in. (TR-158). Claimant's employee file reveals that he received verbal and written warnings from Mr. White about being late or absent on six different occasions between October 26, 1992 and December 10, 1992. (EX-F1 through F6). [FN3] Mr. White noted in Claimant's employment record on December 10, 1992, that Claimant's excuse for his absence the previous two days was that "his medication had him feeling bad so he could not drive. Mr. Campbell said he do not have a phone, and the nearest phone is a mile away' (EX-F6). Mr. White testified that on that occasion he explained to Claimant that he had to call in whether he had a phone or not. He could call at any time, but Claimant just had to call the Shipyard. (TR-153).

Claimant was absent for five straight days between January 4 and January 8, 1993, and he did not call in during that time. (TR-153). Mr. White testified that the rule at Norshipco is that an employee who is absent for five days, must call in some time during that period, or else he will be

terminated. (TR- 154). Claimant's notice of discharge dated January 11, 1993, states that the reason for Claimant's discharge was violation of the company rule against "excessive absenteeism." (EX-F7). Mr. White testified that he did not participate in the decision to terminate. Mr. White explained that as soon as an employee is absent for five days, the decision to terminate comes down from personnel. (TR 154).

The day that Claimant returned to work after his five day absence, Mr. White did not know that Claimant had been terminated. (TR-154). Mr. White gave Claimant a first aid pass that morning, and then subsequently learned that Claimant had been terminated. (TR-155). Mr. White had to go get Claimant out of first aid and walk him through the discharge procedure so that Claimant could return his materials. (TR-155).

Mr. White testified that no one at Norshipco, including Dr. Geib or anyone in personnel ever instructed him to take actions that might get Claimant fired. As well, no one ever talked to him about working Claimant outside of his restrictions, or making Claimant drive when he was not supposed to drive in order that Claimant might quit or be fired. (TR-155). According to Mr. White, no one ever told him that Claimant was going to be fired or that they were trying to get Claimant fired. (TR-156). The only time Mr. White ever heard Claimant complain about the fact that he could not drive was in December when Claimant made the excuse that he missed two days of work because his medication was making him feel so bad that he could not drive. (TR-156). Mr. White testified that he was unaware that Claimant ever made any complaints regarding being worked

outside of his restrictions. (TR- 156).

MEDICAL EVIDENCE
Dr. Philip O. Geib

Dr. Geib, a board certified surgeon and doctor of occupational medicine, was the medical director at Norshipco from 1977 through July 1,1994. (TR-97). As the only physician at the Shipyard, Dr. Geib was responsible for taking care of the industrial injuries and illnesses, the return to work certifications, and the new hires and all medical duties. (TR-98). During his tenure at the Shipyard, Dr. Geib oversaw the treatment of Claimant. (TR-99).

Upon reviewing Claimant's shipyard clinic file, Dr. Geib testified that Claimant suffered an injury on February 10, 1987, when he was struck between the shoulder blades by a raised catwalk. (TR-100). Claimant's First Report of Injury regarding that incident indicated, "employee states back not bothering him, . . . he just has headaches . . . only relieved by Codeine." (TR-101). When Dr. Geib examined Claimant the following day, Claimant said he still had a headache, though it was a little better. (TR-101).

Dr. Geib's records indicate that Claimant reported having a disability from the Veteran's Administration for headaches and was taking Tylenol No. 3 as needed. (TR-101, EX-E2). The next-time Dr. Geib saw Claimant, on February 13, 1987, Claimant said that his back did not hurt anymore and that he suffered headaches occasionally on stress to his neck muscles. (TR-102). For tihis condition, Dr. Geib prescribed Tylenol No. 3, which contains Codeine. (TR-102). Claimant indicated to Dr. Geib that he was going to see the

Veteran's Administration Hospital in April for a headache workup, so Dr. Geib gave Claimant a prescription for the meantime. (TR-02, EX-E2A). The Claimant returned on March 26, 1987 for a refill prescription, and seemed to be doing better. (TR-103, EX-E3).

After the May 2, 1987 injury to his facial bone, Claimant saw Dr. Geib again on May 8, 1987. (TR-104). There is no indication in Dr. Geib's records that Claimant sustained any specific injury to his low back or back. (TR-104). Subsequently, Claimant sought outside treatment with Dr. Suter. Dr. Suter had control of Claimant's medication and treatment. (TR- 105). Dr. Geib had several conversations with Dr. Suter over several months to update him on Claimant's capacity to work and Claimant's medication. (TR-105). Dr. Geib recalled a general conversation with Dr. Suter in which they discussed Claimant's ability to drive under his medication. (TR-106). The physicians agreed that Claimant could drive after work and not too lateat night. (TR-106). Dr. Geib opined that while Claimant had been prescribed six medications, the medications would not interfere with a sedentary job if they were taken reasonably and at the proper time. (TR-132-33). Dr. Geib stated that he would not advise Claimant to drive while taking the medications. (TR-109, 112).

During the period of Claimant's light duty employment, Dr. Geib did not recall Claimant complaining to him that he was being given work outside of his restrictions. (TR-111). Dr. Geib had nothing to do with personnel matters. He was unaware of any discussions prior to Claimant's discharge that dealt with trying to find a way to have Claimant fired or removed from work or any

conversation about working Claimant outside of his restrictions so that he would quit or be fired. (TR-113). Dr. Geib stated that he makes every effort to modify the tasks of injured workers so that they can perform their work. He explained that he tries to work with the patient. (TR-113).

Dr. Cary Suter

Dr. Suter, a neurologist trained in internal medicine and psychiatry, testified by deposition that he first examined Claimant in May 1988. (Suter Deposition, p. 5-6). Dr. Suter noted that Claimant had been in a work-related accident in May 1987, and had continued to experience neck spasms, stiffness, and recurring headaches since the treatment for the initial injury. (Suter Deposition, p. 7). Upon examination, Dr. Suter observed that Claimant had a severe spasm on the left side of his neck, which restricted movement in his neck. Dr. Surer opined from that examination that Claimant's main problem was in his neck and head. (Suter Deposition, p. 7-8).

Claimant described his headaches to Dr. Surer as generalized headaches that came in episodes sometimes associated with nausea. Dr. Suter noted that the recurring headaches Claimant was describing met the description of post- traumatic vascular headaches. (Surer Deposition, p. 8).

From his description these are typical vascular headaches and typical of post-traumatic vascular headaches that we see in 5 to 10% of people with head and neck trauma. These type of headaches need to be treated like migraine headaches with prophylactic and drugs as well as immediate drugs for vascular headaches."
(CX-9 at 3).

Vascular headaches tend to be permanent and more difficult to treat than neck spasm headaches, and they tend to occur in people who have a family history or a background of vascular headaches. (Suter Deposition, p. 9). Dr. Suter explained that the propensity to have vascular headaches is genetic, although the gene which transmits the ability to have these headaches has not been found. (Suter Deposition, p. 32). The most commonly accepted theory regarding these headaches is that the problem starts with a chemical disturbance in the brain that gets projected outward by the nerves. (Suter Deposition, p. 33). The severe headaches can be "stirred up" by various occurrences in the sufferer's life, including illness, medicine, and trauma - particularly to the neck. (Suter Deposition, p. 34). Dr. Suter stated that although the most common post- traumatic headache is a muscular spasm headache, the same trauma can trigger vascular headaches in an individual with a genetic predisposition to the condition. (Suter Deposition, p. 35).

Dr. Suter was not aware of Claimant's medical treatment at the Veteran's Administration hospital for a 1976 injury which resulted in pains in his back from his shoulder blades down. (Surer Deposition, p. 37-38). However, Dr. Surer was not surprised to learn at the deposition that Claimant had complained of headaches since that time to VA physicians. Dr. Surer testified in his deposition that Claimant's headaches since 1976 did not appear to be severe. There was no significant record of emergency room visits or Percodan prescriptions. (Surer Deposition, p. 42). Dr. Suter explained that he did not think Claimant's headaches were comparable to the ones he had after his May 1987 injury, stating:

> I can only say that I had the impression and I still believe that he has much more severe headaches than he suffered in the past if he did suffer headaches in the past as that would indicate. And, I think the accident caused that. And, that's my opinion. And I think it's a reasonably decent opinion.
> (Suter Deposition, p. 40).

While under Dr. Suter's care, Claimant was authorized to perform light duty work three to four hours a day, three days a week, with no hand-held equipment or operating vehicles or driving while taking medication. (CX-9 at 26, 27). Although Claimant was on several different medications for his headache symptoms, Dr. Suter indicated in a letter to Claimant's attorney dated October 19, 1992, that Claimant could continue working if he performed light duty for 20 hours per week. (Suter Deposition, p. 15). By light work, Dr. Surer meant that Claimant could not do heavy lifting and that Claimant was not fit to do much climbing or altitude work. "[Claimant] just couldn't go and do heavy lifting, full time heavy work which I assumed his former job really required." (Surer Deposition, p. 16). Dr. Surer opined that Claimant's problem was finding a location so that he could get to work despite his illness. (Suter Deposition, p. 60). The problem was not whether Claimant could perform the work that the Shipyard had available. Dr. Surer stated that Claimant could have done his job as Dr. Suter understood it: Claimant could work half time, and though he might miss days because of headaches, he was able to work. (Suter Deposition, p. 60).

Dr. Suter testified that he did not think it was safe for

Claimant to drive when he took his headache medicine, which included Fiorinal, Valium and Percodan. (Suter Deposition, p. 17). Claimant was fine to drive if he was just taking the medication for his muscles and milder medications for his headaches, but if Claimant took batches of medicine for the severe headaches, Dr. Surer did not think that Claimant could drive. (Suter Deposition, p. 17). Dr. Suter wrote a report explaining to Claimant which medications were safe for him to drive with, and which should be taken only at night. (Suter Deposition, p. 55). Dr. Surer explained in an office note,

If [Claimant] takes his pm medicine which is Fiorinal tablets, Valium and Percodan, or some combination of this, then I do not believe it would be safe for him to drive. Unfortunately, I think he does need these prn medicines from time to time.

Ideally, he should take them only after work and not in the morning before work or at work.

(CX-9 at 36). In a note dated January 5, 1993, Dr. Suter explained that the medications prescribed to Claimant for his post-traumatic cervical spondylosis and post-traumatic vascular headache may at times cause Claimant to oversleep. (CX-9 at 37).

Dr. Suter opined that Claimant would be best served by receiving rehabilitation to find some other type of work. Dr. Suter explained in a letter dated January 5, 1994, that Claimant's condition worsened because Claimant had been without medicine. Because there was no evidence that Claimant's condition had changed for the better, Dr. Suter opined that Claimant had a permanent disability. (CX-9 at

40). Dr. Suter suggested that Claimant find a job that he could do at home or close to home, although this might require some educational training. (Suter Deposition, p. 17).

Dr. Richard K. Neal. Jr.

Dr. Neal, a neurosurgeon specializing in spinal surgery, saw Claimant for an independent medical examination at the Employer's request on September 19, 1994. (Neat Deposition, p. 4, p. 31). Upon examining Claimant and reviewing Claimant's medical history, Dr. Neal drafted a report, explaining his conclusions. (EX-G2).

Claimant indicated to Dr. Neal that he had an injury at work, as a result of which he sustained a fracture of his zygoma (facial bone). (Neal Deposition, p. 6). Claimant underwent surgery for this condition on May 4, 1987, and was discharged from the hospital on May 6, 1987. (Neal Deposition, p. 6). Dr. Neal testified that Claimant reported severe headaches and pain over the back of his neck ever since the accident, but Dr. Neal found Claimant's difficulties to be "vaguely described and ill-defined." (Neal Deposition, p. 8). As well, Claimant reported that since the injury he has been bothered by pain over the back of his pelvis, a result of the impact injury which caused his spine to be driven down into his pelvis. (EX-G1).

Dr. Neal opined that the headaches Claimant described were more emotional in nature rather than muscular or vascular in nature. (Neal Deposition, p. 9). Dr. Neat explained that an emotional headache occurs in the frontal lobe and is caused by emotional stress and tension. (Neal Deposition, p. 11). According to Dr. Neat, vascular and muscular headaches are not likely to be caused by a blow to

the head. (Neat Deposition, p. 20). Dr. Neal stated that Claimant's headaches could have been vascular in nature but not precipitated by his injury. (Neal Deposition, p. 22).

Dr. Neal testified that, as a result of Claimant's May 2, 1987 work accident, Claimant sustained a right zygomatic fracture, a mild brain injury, cerebral concussion, and a mild posterior neck strain injury. (Neal Deposition, p. 14). Dr. Neat concluded that Claimant had "a more than adequate length of time to make a good and complete recovery" from his injuries. (Neal Deposition, p. 14). Dr. Neal did not feel that Claimant's current headaches and overall pain complaints were related or caused by injuries that he sustained on May 2, 1987. (Neal Deposition, p. 14). Dr. Neal opined,

I do not feel that he has any permanent disability secondary to the injuries that he sustained on May 2, 1987. I feel that he should have been able to return to his regular employment without any work restrictions on August 2, 1987, with the extent of the injuries that he had. I feel that his ongoing difficulties are markedly magnified by emotional overlay and secondary gain factors.
(EX-432).

DISCUSSION

DISCRIMINATORY FIRING

Section 48(a) of the Act provides that:
It shall be unlawful for any employer. . . to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer ....

33 U.S.C. § 948(a). The essence of a discrimination claim is that the person who filed the compensation claim is treated differently than other similarly situated individuals. Holliman v. Newport News Shipbuilding and Dry Dock Co., 852 F.2d 759, 761, 21 B.R.B.S. 124, 128-29 (CRT) (4th Cir. 1988). To prevail on a claim filed pursuant to Section 49, [FN4] the claimant must prove that the employer committed a discriminatory act, and that the act was motivated by animus against the claimant because of the claimant's pursuit of his rights under the Longshore and Harbor Workers' Compensation Act. Holliman v. Newport News Shipbuilding and Dry Dock Co., 852 F.2d 759, 761, 21 B.R.B.S. 124, 128-29 (CRT) (4th Cir. 1988); Rayner v. Maritime Terminals, Inc., 22 B.R.B.S. 5, 7 (1988); Geddes v. Benefits Review Board, 735 F.2d 1412, 1415, 16 B.R.B.S. 88 (CRT) (D.C. Cir. 1984). Discriminatory animus may be analyzed by considering whether the employer treated compensation claimants differently from like groups or individuals, and whether the treatment was motivated, in whole or in part, by animus against the employee because of a compensation claim. Brooks v. Newport News Shipbuilding and DrY Dock C., 26 B.R.B.S. 1,3 (1992), citing Holliman v. Newport News Shipbuilding and Dry Dock Co. 852 F.2d 759, 761, 21 B.R.B.S. 124, 128-29 (CRT) (4th Cir. 1988). The circumstances of the discharge may be examined to determine whether an employer's reasons for firing the employee were credible or a pretext for termination based on the filing of a compensation claim. See Machado v. National Steel & Shipbuilding Co. 9 B.R.B.S. 803 (1978).

Once these threshold elements are established, the claimant is entitled to a rebuttable presumption that the employer's act was at least partially motivated by the

claimant's claim for compensation. Geddes, 735 F.2d at 1418. The burden then shifts to the employer to prove that its animus was not even partially motivated by the claimant's exercise of his rights under the Act. Rayne,. 22 B.R.B.S. at 7; Geddes, 735 F.2d at 1417.

The Claimant contends that the Employer exhibited a discriminatory animus when it required the Claimant to report for light duty work between October 1992 and January 1993. Because the Employer had actual knowledge from the Claimant's treating physician, Dr. Suter, that Claimant was restricted from operating a vehicle and driving while Claimant was taking medication, the Claimant argues that Norshipco's medical director, Dr. Geib, should not have returned the Claimant to light duty in October 1992, without providing transportation for him. The Employer was aware that no public transportation was available to the Claimant to reach Norshipco, and that Claimant did not have the funds to pay for a taxi to drive him to and from work. The Claimant contends that his testimony that the Employer facilitated carpools for other employees in Claimant's region, is sufficient to prove that the Employer was treating Claimant differently from other individuals who had not filed compensation claims.

The Claimant concedes that Dr. Geib did not make the actual decision to terminate the Claimant, but contends that as an agent of the Employer, Dr. Geib placed the Claimant in an untenable position in which termination was the inevitable and anticipated result. Although Dr. Geib testified that the Claimant should neither work nor commute to and from work while taking medication, Dr. Geib refilled six prescriptions for Claimant in November 1992 while the

Claimant was on light duty. Thus, the Claimant argues, Dr. Geib placed him in a Catch-22 position: on one hand, Dr. Geib told Claimant not to work or drive when taking the prescribed medication for headaches and pain, and on the other hand, he released the Claimant to perform light duty work knowing that the Claimant could only reach the worksite by a long drive and that the Claimant would not be able to take medication for his ongoing pain and headaches while at the worksite.

There is no evidence that Dr. Geib conspired to get Claimant fired from his position at the Shipyard. Dr. Geib's advice that the Claimant should not drive while on his medication mirrored the advice from Claimant's treating physician that the strong medication should be taken only after work or when Claimant would not be driving. Dr. Geib did not know that the Claimant had been discharged until after the fact. (TR-113). He also denied knowledge of any discussions prior to Claimant's discharge regarding a means to have Claimant fired or removed from work. Dr. Geib was not aware of any conversations about working Claimant outside of his restrictions so that he would quit or be fired. (TR-113)

The Claimant was discharged from Norshipco for violating the company rule regarding excessive absenteeism. (EX-F7). Prior to his discharge, Claimant had been given numerous verbal and written warnings about his tardiness and absence from work between October and December 1992. (EX-F). Claimant's supervisor, Mr. White, was often sympathetic to Claimant's situation and would wait until noon before giving Claimant a warning about being late or absent. (TR-158). As well, if Claimant became drowsy at

work due to his medication, then Mr. White would let him take a break. (TR-156). These actions demonstrate that the Employer was accommodating the Claimant rather than discriminating against him. The Employer's tolerance for Claimant's frequent lateness and absence was always accompanied by warnings and counseling regarding the consequences of such behavior. The Claimant's testimony that he was unaware of Norshipco's Five Day Rule is not credible in fight of the multiple warnings administered to the Claimant and the Claimant's subsequent testimony that Mr. White told him he would lose his job if he could not get to work on time. (TR-82).

The Claimant correctly points out that the fact finder in this case must be able to readily determine that, although Claimant's discharge was for the violation of the Five Day Rule, the circumstances leading up the that discharge were due to the Claimant's claim for compensation for his May 2, 1987 injury. The evidence in this case does not support this conclusion. The circumstances leading up to Claimant's discharge reveal that the Claimant was instructed by his physicians not to take his medication before driving, and that the Shipyard provided great leniency to the Claimant by permitting him to rest whenever he needed to at work, and to repeatedly come to work late or not at all. Claimant was not required to come to work if he was disabled by his medication. Rather, he was simply required to call in to inform his supervisor of his intended absence. The fact that no carpool arrangements could be made to accommodate Claimant's four-hour day work restrictions is hardly indicative of an intention by the Shipyard to prevent the Claimant from coming to work.

Furthermore, there is no evidence that the Claimant was disabled from having telephone service at his home. Although the Claimant opted not to have telephone service to his home, resulting in a situation where the closest phone was one and a half miles away, such a voluntary hardship was not imposed on the Claimant by the Employer. The circumstances of this case do not support a finding that the Employer exhibited discriminatory animus by applying the Five Day Rule uniformly to the Claimant as it would have to any other similarly disabled employee. I find that the Claimant has failed to prove that the Employer acted with discriminatory animus subject.

CAUSATION

To qualify for disability benefits under the Act, Section 2(2) of the Act requires that the injury sustained by the claimant must arise out of and in the course of employment. A claimant is aided by the Section 20(a) presumption which states that "in the absence of substantial evidence to the contrary," it is presumed a(t)hat the claim comes within the provisions of the Act." 33 U.S.C. § 920(a). Pursuant to Section 20(a), the claimant must show, one, that he sustained physical harm, . an injury; and, two, a work-related accident occurred or working conditions existed which could have caused the harm. By proving these elements, the claimant has established a prima facie case and is entitled to a presumption that the injury arose out of employment. Keliata v. Triple Machine Shop, 13 B.R.B.S. 326 (1981); Adams v. General Dynamics Corp., 17 B.R.B.S. 258 (1985); and Jones v. J.F. Shea Co., Inc 14 B.R.B.S. 207 (1981).

Once the claimant establishes a prima facie case, the

burden shifts to the employer to rebut. the Section 20(a) presumption and to establish, with substantial countervailing medical or factual evidence, that Claimant's harm was not caused or aggravated by the working conditions. Parsons Corp. of CA v. Director, OWCP. 619 F.2d 38 (9th Cir. 1980); Rajotte v. General Dynamics Corp., 18 B.R.B.S. 85 (1986); and Hensley v. WMATA, 65 F.2d 264, 13 B.R.B.S. 182 (CRT) (D.C. Cir. 1981), cert. denied, 456 U.S. 904 (1982), rev'g 1 B.R.B.S. 468 (1979). If the claimant's evidence is rebutted, the presumption no longer controls and the administrative law judge must examine the competing evidence as a whole. See Del Vecchio v. Bowers, 296 U.S. 280 (1935); Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 B.R.B.S. 466 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); Volpe v. Northeast Marine Terminals, 671 F.2d 697, 14 B.R.B.S. 538 (2d Cir. 1982).

Claimant's May 2, 1987 head injury is undisputed. All of the medical evidence supports Claimant's testimony that as a result of the injury Claimant's cheek bone was broken, his jaw bone was compressed so that he could no longer open his mouth, and he experienced neck and back pain. (TR-24). At issue is whether Claimant's subsequent headaches were a result of this injury. Dr. Suter, Claimant's treating physician, opined that Claimant's disabling headaches were the result of his May 2, 1987 work-related injury. Although Claimant's Veteran's Administration hospital records reveal that the Claimant complained of headaches for several years prior to his May 1987 injury, Dr. Suter testified that he did not think Claimant's pre-injury headaches were comparable to the ones he had after the injury.

> I can only say that I had the impression and I still believe that he has much more severe headaches than he suffered in the past if he did suffer headaches in the past as that would indicate. And, I think the accident caused that. And, that's my opinion. And I think it's a reasonably decent opinion. (Suter Deposition, p. 40).

Dr. Suter described Claimant's recurring headaches as vascular headaches triggered by Claimant's traumatic injury. (Suter Deposition, p. 8). Dr. Suter explained that post-traumatic vascular headaches occur in about five to ten percent of the people who encounter head and neck trauma. Although the prevailing medical theory is that vascular headaches may have a genetic basis, Dr. Suter stated that individuals with a genetic predisposition to this condition can begin to experience the severe headaches only after an occurrence such as illness, medicine or trauma, particularly, trauma to the neck. (Suter Deposition, p. 32-34). These types of headaches are treated like migraine headaches with strong drugs and painkillers. (CX-9a t 3). Thus, according to Dr. Suter, as a direct result of his May 1987 injury, Claimant experienced severe headaches and received restrictions to perform only light duty work because of his headache pain and the medications he was receiving for the symptoms. (CX-9 at 34). This evidence is sufficient to satisfy Claimant's prima case that he suffered an injury and that work-conditions existed which could have caused that condition.

The Employer contends that, although Claimant's May 1987 work-related injury is undisputed, the headaches which subsequently disabled him from work were not related

to that injury, but, rather, represented a continuing problem with headaches which Claimant had been reporting to the VA since 1980. After examining Claimant on only one occasion and reviewing his medical records, Dr. Neal concluded that Claimant's headaches were emotional in origin and were not caused or aggravated by his 1987 injury. (Neal Deposition, p. 14, 18, 22). Dr. Neal opined that Claimant had recovered from his 1987 injury by August 1987. (Neal Deposition, p. 14). Dr. Neal believed that Claimant's pain complaints were markedly magnified by emotional overlay and secondary gain factors. (Neal Deposition, p. 14). Based on Dr. Neal's opinion, and the record which includes evidence from Dr. Geib that Claimant was reporting headaches prior to his May 1987 injury, the Employer has introduced substantial countervailing evidence to rebut the presumption that Claimant's headache condition was caused by his May 1987 injury.

Because the Employer's evidence is sufficient to rebut the presumption of causation, the record must be viewed as a whole. Essentially, the Claimant and the Employer rely on contradictory medical opinions to prove their respective cases. Thus, the credibility of the medical testimony must be weighed. Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a one time examining physician. Honaker v. Jewel Ridge Coal CO., 12 B.R.B.S. 609, 616 (1980); see also Hensley v. WMATA. 13 B.R.B.S. 182, 194 (D.D.C. Cir. 1981).

Dr. Neal examined Claimant on only one occasion for purposes of providing a medical opinion to the Employer regarding the Claimant's condition. Dr. Neal testified that his speciality is spinal surgery rather than treatment of patients

with chronic headache. (Neal Deposition, p. 31). On the other hand, Dr. Surer had been Claimant's treating physician since May 1988. (Suter Deposition, p. 5-6). He was primarily responsible for Claimant's diagnosis and care throughout the period of Claimant's disability. Accordingly, Dr. Suter's opinion should be accorded greater weight. Because Dr. Suter opined that Claimant's headache condition was a direct consequence of Claimant's May 1987 work-related injury, the Claimant has successfully proven causation.

TEMPORARY TOTAL DISABILITY

Total disability is defined as complete incapacity because of injury to earn the wages that the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Under current case law, the employee bears the initial burden of proving that he cannot return to his regular or usual employment due to his work-related injury. If the employee satisfies this burden, the burden shifts to the employer to establish the existence of realistically available job opportunities within the geographical area where the employee resides, which the employee was capable of performing, considering his age, education, work experience and physical restrictions. Trans-State Dredging v. Benefits Review Board 731 F.2d 199, 16 B.R.B.S. 74 (CRT) (4th Cir. 1984), rev'g Tamer v. Trans-State Dredging, 13 B.R.B.S. 53 (1980); Newport News Shipbuilding and Dry Dock Co. v. Director. OWCP [Chappell], 592 F.2d 762, 10-B.R.B.S. 81 (CRT) (4th Cir. 1979). Where an employer has provided a claimant with suitable alternate employment at its own facility, that employer has met its burden of establishing suitable alternate employment. Spencer v. Baker Agric. Co., 16 B.R.B.S. 205

(1984); Darden v. Newport News Shipbuilding and Dry Dock CO, 18 B.R.B.S. 224, 226 (1986). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co. 22 B.R.B.S. 332 (1989); MacDonald v. Trailer Marine Transp. Co., 18 B.R.B.S. 259 (1986).

The Claimant contends that he was disabled from performing his usual employment due to the vascular headaches that afflicted him following his May 1987 work-related injury. (TR-41). Prior to this injury, Claimant had been working without restriction as a rigger at the Shipyard. (TR-23). After the injury, the Claimant experienced disabling headaches which were more severe than ;my headaches the Claimant had in the past. (Surer Deposition, p. 40). As a result of his headache condition and the accompanying medication necessary to treat the symptoms, the Claimant was released to work only light duty. In order to accommodate Claimant's headache condition and the medications used to treat the symptoms, Dr. Suter authorized the Claimant to work twenty hours a week, as long as it was light work. (CX-9 at 34). Dr. Suter explained in a note to Dr. Geib dated December 2, 1992, that Claimant should have a light duty position, under the restriction that Claimant could perform light duty work four hours a day with no hand-held equipment. (CX-9 at 35). The Shipyard medical director, Dr. Geib agreed with Dr. Suter that the Claimant was capable of performing only light duty work as a result of his headache condition and the accompanying medication. (TR-132-33).

This medical evidence is sufficient to support Claimant's prima facie case that he was unable to perform his usual employment due to the symptoms resulting from his

work-related injury.

The Employer seeks to prove that the Claimant is not entitled to total disability because suitable alternate employment was available to the Claimant which he could perform within his restrictions. In October 1992, Dr. Geib authorized the Claimant to begin light duty work under the supervision of Duane White in the Shipyard's light duty shop. (TR-25). Claimant worked twenty hours per week in the shop fixing electrical lights and extension cords. (TR-148). Mr. White explained that Claimant's job involved disassembling broken lamp guards using a hand- held electrical drill and putting on new guards. (TR-149- 50). Claimant testified that the job required the use of hand-held equipment such as pliers, screwdrivers, and a drill to remove light bulbs that had broken off inside the protective housing. (TR-29). As well, Claimant often had to lift the heavy drop cords, although sometimes the other men in the shop would help him with the lifting. (TR-29).

Claimant said that this work caused him problems. The medical restrictions from Dr. Surer, and approved by Dr. Geib, specified that the Claimant could perform light duty work three to four hours a day, three days a week, with no hand-held equipment, operating a vehicle or driving while taking medication. (CX-9 at 26, 27). Claimant testified that while he was in the light duty shop the motions of using the hand-held equipment, in addition to the stooping and bending, caused pain in his neck, across his shoulder blades and in his hip. This would inflame his headaches, requiring medication for the pain. (TR-30). Claimant's supervisor testified that whenever Claimant felt bad or could not work, he would permit Claimant to go back in the comer and rest

for as long as he needed. (TR-150, 156).

According to Mr. White, Claimant never complained about being worked outside of his restrictions. (TR- 156). Dr. Geib also did not recall Claimant reporting to him that he was being given. work outside of his restrictions. (TR-I 11). However, Claimant testified that during the period of his light duty employment, between October 1992 and January 1993, he complained to his union that the Employer was working him outside of his restrictions. (TR-69). Claimant believed that his union steward filed a grievance on his behalf, but Claimant did not follow up on the union's action regarding this matter and he did not know what the union did for him. (TR-70). Claimant recalled that a grievance hearing was scheduled for February 9, 1993, and that he did not show up, and that when the hearing was rescheduled for March 5, 1993, he again failed to appear, so the grievance was dismissed. (TR-73).

Dr. Suter testified by deposition that Claimant's problem with the light duty job available at the Shipyard was not whether Claimant could perform the work. Dr. Suter stated that Claimant was capable of working the light duty job that was provided to him: Claimant could work half time, though he might miss days because of headaches. (Suter Deposition, p. 60). According to Dr. Suter, "[Claimant] just couldn't go and do heavy lifting, full time heavy work which I assumed his former job really required." (Suter Deposition, p. 16). By light work Dr. Suter meant that Claimant could not do heavy lifting or climbing and altitude work. (Suter Deposition, p. 16). The only problem was finding a job for Claimant in a location closer to his home so that he could get to work despite his illness. (Suter Deposition, p. 60). Dr.

Surer was concerned about Claimant driving while taking the medication prescribed to ease his migraine headaches. (Suter Deposition, p. 17). According to Dr. Surer, Claimant was fine to drive if he was just taking the medication for his muscles and milder medications for his headaches, but if Claimant took batches of medicine for the severe headaches, Dr. Suter did not think that Claimant could drive. (Suter Deposition, p. 17).

The evidence as a whole indicates that the Claimant was physically capable of performing the light duty work that was offered to him. Claimant worked no more than twenty hours per week, and was given special consideration regarding his need to be late or to take a break during work. (TR-150, 158). Dr. Suter opined that the most significant restriction on Claimant's ability to work was that Claimant could not perform "heavy liming ... [or] full time heavy work." (Suter Deposition, p. 16). Although at the time Claimant was released to light duty work, Dr. Geib indicated that, in addition to the restriction on Claimant's working hours, Claimant was also restricted from using hand-held equipment, the Claimant never complained about being worked outside of his restrictions to his supervisor, his treating physician, or to the Shipyard medical director. (TR-156, 111). Claimant, likewise, never followed up on his allegations to the union representative that the Shipyard was working him outside of his restrictions. (TR-69-75).

An award of permanent total disability compensation concurrent with continued employment will usually only be granted in circumstances where post- injury employment is due solely to the beneficence of the employer or where claimant's continued employment is due to an extraordinary

effort and in spite of claimant's excruciating pain and diminished strength. See Haughton Elevator Co. v. Lewis, 7 B.R.B.S. 838, 572 F.2d 447 (4th Cir. 1978), aff'g 5 B.R.B.S. 62 (1976). See also Kimmel v. Sun Shipbuilding & Dry Dock Co., 10 B.R.B.S. 310 (1979); Ford v. Sun Shipbuilding & Dry Dock Co. 8 B.R.B.S. 687 (1978).

In the instant case, Claimant has merely alleged the existence of pain while working. Claimant does not point to any circumstances which reflect that he was making an extraordinary effort to work. In fact, the Shipyard allowed Claimant to arrive late and to rest or nap while at work in response to his pain. It appears from the evidence that the Shipyard complied with the major restriction on Claimant's ability to work, which was the restriction on his time, and made reasonable accommodation for any discomfort Claimant may have experienced in attempting to arrive to work or actually perform the work. Accordingly, I find that the Employer has shown that suitable alternative employment was available to the Claimant.

Suitable alternate employment may be unavailable to a claimant if the employer finds out that the claimant violated company rules. Brooks v. Director, OWCP, 27 B.R.B.S. 100 (CRT) (1993) (work-related injury led employer to discover petitioner's falsification of company records and to fire petitioner, Board's denial of benefits was upheld); see also Harrod v. Newport News Shipbuilding and Dry Dock Co., 12 B.R.B.S. 10, 14-16 (1980) (employer met burden by showing alternative job given claimant, even though claimant was later fired for violating a company rule against bringing handguns to work). In the instant case, the light duty job performed by the Claimant from October 1992

through early January 1993, continued to be available to the Claimant. Dr. Suter also testified that Claimant could perform the work that the Shipyard had available. (Suter Deposition, p. 60). The only reason that the Claimant did not continue to perform the suitable alternate employment was because he was fired for violating a company rule. The Claimant's failure to appear for work or call in for five days in a row, represented a violation of the company policy against absenteeism, for which the Claimant had been counseled on several occasions. (TR- 151). Thus, the Claimant has failed to prove that he is entitled to compensation for a temporary total disability.

ORDER

Accordingly, the Claimant's claims for disability compensation and for reinstatement are DENIED.

/s/ RICHARD K. MALAMPHY
Administrative Law Judge

FN1. The following abbreviations will be used as citation to the record:

Cx. - Claimant's Exhibits
Ex. - Employer's Exhibits
TR - Transcript

FN2. The stipulations were set forth at the hearing. (Tr. 8-10).

FN3. Claimant received a verbal warning for failure to be at work at starting time on October 26, 1992. (EX-F 1). He got a written warning regarding excessive tardiness on November 3, 1992. (EX-F3). On November 9, 1992, he

received a verbal warning for being absent. (EX-F4). Claimant was given a written warning for being absent without calling in on December 8 and 9, 1992. (EX-F6). Finally, he was absent from January 4, 1993 through January 8, 1993 without calling in, for which he was ultimately discharged. (EX-F7).

FN4. Prior to the 1984 amendments, this section of the Longshore and Harbor Workers' Compensation Act was numbered "49." Occasionally it is still, though incorrectly, referred to as "Section 49."